117-348

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 924.

JOSEPH C. MACKIN AND WILLIAM J. GALLAGHER,
PLAINTIFFS IN ERROR,

VS.

THE UNITED STATES.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED AUGUST 31, 1885.

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INDEX.

	Original.	Print.
Caption	1	1
Petition for writ of error	2	1
Order postponing hearing	4	2
Order postponing hearing	5	2
Order taking petition under advisement	6	3
Order granting writ of error	7	3
Bond	9	3
Writ of error	11	4
Transcript of record from district court	12	5
Caption	14	5
Affidavit of A. M. Day	14	5
Leave to file information	16	6
Information	16	7
Bench warrant	27	17
Motion to set aside information	28	18
Motion to quash	30	19
Order overruling both	30	20
Order on County Clerk Ryan to produce returns	31	21
Order on County Clerk Ryan to show cause	32	21
Order, writ of attachment	32	21
Certified copy of order of February 4, 1885	32	22
Return thereon	34	22
Certified copy of order of February 4, 1885	35	23
Return thereon	36	24
Exception to manner of impaneling jury	36	24
Jury impaneled	38	25

Transcript of record from district court—Continued.

	Original.	Print.
Orders of adjournment from day to day	39	26
Motion to instruct jury to acquit	42	28
Order overruling same; exception	42	29
Orders of adjournment from day to day	43	29
Verdict	46	31
Motion for new trial (Gallagher)	48	33
Motion for new trial (Mackin)	49	33
Recognizances	50	34
Judgment	51	35
Motion in arrest of judgment	53	36
Stay of execution	54	37
Bill of exceptions	54	37
Testimony of John Scheuster	55	37
James E. Adams	56	38
J. C. Sullivan	57	39
Edward D. Kelley	57	39
Cephas M. Burkhardt	58	39
Charles Larsen	58	40
Robert G. Montgomery	59	40
J. S. Grinnell	59	40
Christopher Mamer	59	40
George R. Rockfellow	59	40
Michael W. Ryan	59	40
Michael W. Ryan (recalled)	63	43
Grinnell, Mamer, and Rockfellow (recalled)	60	41
E. A. Drummond	60	41
S. P. Shields	61	41
Chester M. Dawes	61	41
A. L. Chetlain	63	43
J. B. Jeffery	66	44
Henry McGurren	67	45
Charles R. Larrabee	67	45
Jerry S. Thompson	67	45
W. J. Sweenie	68	46
Samuel B. Wright	69	46
William H. Wright	71	48
S. W. Fallis	74	49
Frederick N. Tucker	76	51
John Wynne	77	51
J. Edward Wynne	77	52
H. W. Beers	78	52
C. K. Lush	79	53
Nelson A. Cool	79	53
Albinus H. Wright	79	53
Certificate attached to poll-book No. 1	81	54
Certificate attached to poll-book No. 2	91	61
Testimony of S. W. Fallis (recalled)	102	69
E. D. Kelley (recalled)	102	69
C. K. Lush (recalled)	102	70
Max Fries	102	70
Charles S. Powers	103	70
William A. S. Graham	103	70
Edward Hood	104	70

Transcript of record from district court—Continued.

Bill of exceptions—Continued.

	Original.	Print.
Testimony of M. E. Stone	104	71
H. B. Dox	105	71
M. C. Lightner	106	72
J. O'Laughlin	106	72
W. P. Holland	106	72
John N. Jewett	106	72
J. H. Dole	107	72
C. Doyle	107	73
A. H. Burley	107	73
J. B. Shields	108	73
William O'Hare	108	73
E. C. Blum	108	73
E. R. Jewett	109	74
J. B. Kitchen	109	74
Charles Harpell	109	74
C. D. Wright	110	74
Burke Waterloo	110	75
Le Grand Odell	111	75
R. Brand	113	77
C. H. Good	113	77
A. S. Young	115	78
A. M. Hirsh	115	78
St. Clair Sutherland	116	79
James Sullivan	116	79
T. P. Tolman	118	80
David Vernon	118	80
Henry R. Tollman	118	80
M. Jamieson	119	80
D. Scully	119	81
G. Kersten	120	81
E. H. Emery	120	81
G. P. English	121	82
N. A. Cool	121	82
Chester M. Dawes	122	82
G. A. Mariner	123	83
Motion to instruct jury to acquit	124	84
To strike out evidence	124	84
Same overruled	125	84
Testimony as to Mackin ruled out	125	85
Instruction prayed and denied	126	85
Charge to the jury	128	86
Exception to same	145	98
Clerk's certificate	149	100
Recognizances	150	100
Appearance of E. A. Storrs as counsel	152	101
Order postponing hearing	154	102
Order taking cause under advisement	155	102
Order announcing division in opinion	156	103
Judgment	157	103
Certificate of division	158	103
Stipulation as to hearing in Supreme Court, &c	160	104
Clerk's certificate	164	105

1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the Hon. John M. Harlan, one of the justices of the Supreme Court of the United States, and the Hon. Walter Q. Gresham, judge of the United States circuit court for the seventh circuit, on Friday the twenty-second day of May, in the adjourned May term of said court, in the year of our Lord one thousand eight hundred and eighty-five and of our Independence the one hundred and ninth year. William H. Bradley, clerk.

JOSEPH C. MACKIN AND WILLIAM J. GALLAGHER, plaintiffs in error, *vs.* THE UNITED STATES OF AMERICA, DEFENDANT in error.	Error to district court.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the fourteenth day of March, 1885, came William J. Gallagher and Joseph C. Mackin, by their attorneys, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, their petition for a
writ of error in said entitled cause, which said petition is in the
2 words and figures following, to wit:

Petition for writ of error.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States in and for said district.

WILLIAM J. GALLAGHER, JOSEPH C. MACKIN, impleaded, *vs.* THE UNITED STATES.	Petition in error and assignment of error.

Now come the said William J. Gallagher and Joseph C. Mackin, respectively, plaintiffs in error, and aver that manifest error hath intervened in the proceedings in the district court of the United States for the said district, whereof the foregoing is a record in this, that the district court erred—

I. In overruling the motion to instruct the jury to return a verdict of not guilty as to each of the petitioners in error;

II. In overruling the motion to strike out all the testimony introduced in chief in this cause in behalf of the United States;

3 III. In admitting testimony offered in behalf of the United States;

IV. In excluding testimony offered by each of the petitioners in error respectively;

V. In refusing to charge the jury as prayed;

VI. In each and every of those portions of the charge to the jury to which exception was taken;

VII. In overruling the motions for a new trial and those in arrest of judgment;

VIII. In entering judgment and imposing sentence upon the verdict; and,

IX. In other rulings, orders, and proceedings of the court apparent upon the record.

Wherefore these petitioners pray that a writ of error may issue herein to said district court returnable to the next term of this court, and that such proceedings may be had thereon as provided by law.

WILLIAM J. GALLAGHER.
THOMSON & FELSENTHAL,
His Attorneys.
JOSEPH C. MACKIN,
By DAVID TURPIE, *His Attorney,*
Per H. W. THOMSON.

(Endorsed:) Filed March 14th, 1885. Wm. H. Bradley, clerk.

4 Afterwards, to wit, on the seventeenth day of March, in the adjourned March term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

In the matter of the petition of Joseph C. Mackin and William J. Gallagher for a writ of error, &c.

Now come the petitioners, William J. Gallagher, by Henry W. Thomson, esq., his attorney, and now come also the respondent, the United States, by the district attorney, and J. B. Hawley and I. N. Stiles, their attorneys, and now comes on to be heard the petition of said William J. Gallagher and Joseph C. Mackin for a writ of error, and, after hearing the arguments of said Henry W. Thomson, and the arguments of the counsel on behalf of the United States, it is ordered that the further hearing of said petition be postponed to Thursday next.

5 Afterwards, to wit, on the twentieth day of March, in the adjourned March term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

In the matter of the petition of Joseph C. Mackin and William J. Gallagher for a writ of error, &c.

Now come again the petitioners, Joseph C. Mackin and William J. Gallagher, by E. A. Storrs and Henry W. Thomson, their respective attorneys, and now come also again the respondent, the United States of America, by their respective attorneys; and now comes on further to be heard the petition of Joseph C. Mackin and William J. Gallagher for a writ of error and stay of proceedings as prayed in said petition, and after hearing the further arguments of the respective counsel upon said petition, the hour of adjournment having arrived, it is ordered that the further hearing be postponed until to-morrow morning.

6 Afterwards, to wit, on the twenty-first day of March, in the adjourned March term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

In the matter of the petition of Joseph C. Mackin and William J. Gallagher for a writ of error.

Now come again the petitioners, Joseph C. Mackin and William J. Gallagher, by their respective attorneys, E. A. Storrs and Henry W. Thomson, and the respondents, the United States of America, by their attorneys, and now comes on further to be heard the petition of said Joseph C. Mackin and William J. Gallagher for a writ of error and stay of proceedings as prayed for in said petition, and after hearing the concluding arguments of counsel upon said petition the court takes the same under advisement.

7 Afterwards, to wit, on the twenty-fourth day of March, in the adjourned March term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

In the matter of the petition of Joseph C. Mackin and William J. Gallagher for a writ of error, &c.

8 Now come the petitioners, Joseph C. Mackin and William J. Gallagher, by E. A. Storrs and Henry W. Thomson, their respective attorneys, and now come also the respondents, the United States of America, by their attorneys, and the court, having considered and being now fully advised in the premises, now orders that a writ of error issue to the district court of the United States for this district commanding the said district court to send under the seal thereof to this court, by the first Monday of May next, the record and proceedings in the matter of the criminal information exhibited in said district court on the part of the United States of America against said Joseph C. Mackin and William J. Gallagher, and against Arthur Gleason and Henry Biehl, and that proceedings in said cause in said district court be stayed until the order of this court in the premises. And it is further ordered that said petitioners give bond in error in the sum of one thousand dollars, with sufficient security, and that said petitioners, Joseph C. Mackin and William J. Gallagher, be admitted to bail in the sum of fifty thousand dollars each.

9 On the same day, to wit, on the twenty-fourth day of March, 1885, there was filed in said clerk's office a bond in said entitled cause, which said bond is in the words and figures following, to wit:

Bond.

Know all men by these presents that we, William J. Gallagher and Joseph C. Mackin, as principals, and Michael C. McDonald, August

Mette, Dennis Cavanaugh, and John W. Crawford, as sureties, are held and firmly bound unto the United States of America in the sum of one thousand dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 24th day of March, A. D. 1885.

The condition of this obligation is such that whereas on the 12th day of March, A. D. 1885, by the consideration of the district court of the United States of the northern district of Illinois in a certain criminal cause, to wit, a certain information against the above named William J. Gallagher and Joseph C. Mackin for conspiracy (being criminal cause No. 1033 in that court), the said William J. Gallagher and Joseph C. Mackin were severally adjudged and sentenced to imprisonment in the penitentiary at Joliet, in said district, for the term of two years, and to pay a fine of five thousand dollars each; and and whereas upon the petition of the said William J. Gallagher
10 and Joseph C. Mackin the circuit judge of the said United States for the seventh circuit has allowed a writ of error from the circuit court of the said United States for the district aforesaid to the said district court upon the judgment and sentence aforesaid, and said writ of error is about to issue accordingly: Now, if the said William J. Gallagher and Joseph C. Mackin shall prosecute said writ to effect and shall abide the judgment of the said circuit court in that behalf, and shall answer all costs in case they or either of them shall fail to make good his plea, then this obligation shall be void, and otherwise shall remain in full force.

WILLIAM J. GALLAGHER. [SEAL.]
J. C. MACKIN. [SEAL.]
M. C. McDONALD. [SEAL.]
JOHN W. CRAWFORD. [SEAL.]
AUGUST METTE. [SEAL.]

(Endorsed:) Filed March 24, 1885. Wm. H. Bradley, clerk.

11 The following is a copy of the writ of error:

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the judge of the district court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said district court between the United States of America, plaintiff, and Joseph C. Mackin, Wm. J. Gallagher are defendants, in information a manifest error hath happened, to the great damage of the said Joseph C. Mackin and Wm. J. Gallagher, as by their complaint appears, and it being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the circuit court of the United States for the northern district of Illinois, together with this writ, so that you have the same at Chicago on the first Monday of May, A. D. 1885, in said circuit court to be then and there held; that the record and proceedings aforesaid being inspected, the said circuit court may cause further to be done therein to correct that error what of right and according to the law and the custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twenty-fourth day of March, of the year of our Lord one thousand eight hundred and eighty-five and of the Independence of the United States the 109th year.

[SEAL.] WM. H. BRADLEY,
Clerk of the Circuit Court United States
for the Northern District of Illinois.

(Endorsed:) Filed M'ch 24, 1885. Wm. H. Bradley, clerk.

12, 13 On the same day, to wit, on the twenty-fourth day of March, 1885, there was filed in said clerk's office a transcript of record from the district court of the United States for the northern district of Illinois, in said entitled cause, which said transcript is in the words and figures following, to wit:

14 Pleas in the district court of the United States for the northern district of Illinois, held at the United States court rooms in the city of Chicago, in the district aforesaid, before the Hon. Henry W. Blodgett, district judge of the United States for said northern district of Illinois, on Thursday, the 12th day of March, in the adjourned March term of said court, in the year of our Lord one thousand eight hundred and eighty-five, and of our Independence the one hundred and ninth year. Wm. H. Bradley, clerk.

THE UNITED STATES OF AMERICA
vs.
JOSEPH C. MACKIN, WILLIAM J. GALLAGHER, and Arthur Gleason.
} Gen. No. 1033.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered, that on the twentieth day of January, A. D. 1885, came Albert M. Day, and filed in the office of the clerk of the district court of the United States for the northern district of Illinois, at Chicago, in said district, an affidavit in said above-entitled cause, which said affidavit is in the words and figures following, to wit:

Affidavit.

UNITED STATES OF AMERICA,
Northern District of Illinois.

In the district court.

Albert M. Day, of the city of Chicago, being duly sworn, upon his oath says, that an election was held in said district on the 4th day of November, 1884, at which election there were votes cast for candidates for Representatives in the Congress of the United States, and for other officers;

that one of the polls at said election was opened and held at the second election precinct of the eighteenth ward of the city of Chicago in said district, and that at said poll at said election votes were cast for va-
15 rious officers to be elected, and also for Representatives in Congress;
that at said poll and at said election a poll-book was kept by the officers of said election; and that to said poll-book was appended a certificate by said officers setting forth the number of votes cast at said poll at said election and the number of votes cast for each candidate voted for at said election; that there was also made out by the officers at said election poll a tally-list of the votes cast at said election poll and received by each candidate voted for at said election poll, as required by law; that the officers at said election poll caused the ballots cast at the same to be strung upon a string and placed in the ballot-box in use at said election poll, and that afterwards (on or about the 5th day of November, 1884), said officers, or some one of them, caused said poll-book, said tally-list, and said ballots to be conveyed to the county clerk's office of Cook County, in said district, for safe keeping, as required by law. And that, afterwards, to wit, on or about the 21st day of November, 1884, at said district, divers persons unlawfully conspired together to mutilate, change, and falsify said poll-book and said certificate and said tally-list, and to remove, change, and destroy said ballots or some of them, and to substitute, in place of the same, false and fraudulent ballots; and that, in pursuance of said conspiracy, said divers persons did mutilate, change, and falsify said poll-book and said certificate and said tally list, and did remove, change, and destroy said ballots, and did substitute, in place of the same, false and fraudulent ballots; and further, that this affiant is informed and verily believes that among the persons guilty of said conspiracy aforesaid, and of the acts done in furtherance of said conspiracy as aforesaid, are Joseph C. Mackin, William J. Gallagher, Arthur Gleason, Henry Biehl; and this affiant is informed and believes that each and every of said persons so named did one or more acts in furtherance of said conspiracy.

ALBERT M. DAY.

Subscribed and sworn to before me this 20th day of January, 1885.
[SEAL.] WALTER A. DODSON,
Notary Public.

(Endorsed:) Filed January 20, 1885. Wm. H. Bradley, clerk.

16 On the same day, to wit, on the twentieth day of January, 1885, in the December term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, judge, is the following entry, to wit:

Order.

THE UNITED STATES OF AMERICA
vs.
JOSEPH C. MACKIN, WILLIAM J. GALLAGHER,
Arthur Gleason, and Henry Biehl.
} Criminal information for violating section 5440 Revised Statutes.

Now comes the district attorney, and on his motion it is ordered that he have leave to file a criminal information against Joseph C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl, which is accordingly done, and on further motion of the district attorney, it is ordered that a bench warrant issue against said defendants, returnable forthwith, and that the bail of the defendants be fixed at ten thousand dollars each.

On the same day, to wit, on the twentieth day of January, 1885, came R. S. Tuthill, the United States district attorney for said district, and filed in said clerk's office an information against Joseph C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl, which said information is in the words and figures following, to wit:

17 In the district court of the United States of America for the northern district of Illinois, of the December term, in the year of our Lord eighteen hundred and eighty-four.

NORTHERN DISTRICT OF ILLINOIS, *sct.:*

Be it remembered that Richard S. Tuthill, attorney of the United States of America for the northern district of Illinois, who for the said United States in this behalf prosecutes, in his own person comes here into the district court of the said United States for the district aforesaid on this twentieth day of January, in this same term, and for the said United States gives the court here to understand and be informed that on the fourth day of November, in the year of our Lord eighteen hundred and eighty-four, a general election was held in the State of Illinois, as appointed by law, for the choosing of a Representative in the Congress of the said United States from each of the several Congressional districts of the said State, and certain State and county officers; and at a certain poll of the said election, to wit, the poll of that election in and for the second election district of the Eighteenth ward of the city of Chicago, within the county of Cook and the judicial district aforesaid and the Fourth Congressional district of the said State, a large number of votes, to wit, six hundred votes and upwards, were then cast by the respective voters at that poll of election for a Representative in the said Congress from the Congressional district aforesaid; and afterwards, to wit, on the day and year last aforesaid, within the county and judicial district aforesaid, upon the closing of the said poll of election, and upon the proceeding by the proper judges of election to canvass the votes there polled, the proper clerks of election made two tally-lists in writing, purporting to show the votes received by each candidate there voted for in form as required by law; and afterwards, to wit, on the fifth day of November, in the same year, within the county and judicial district aforesaid, upon the examination and counting of the votes cast at the said poll of election the proper judges and clerks of election made upon each of the poll-books of the said poll of election a certificate in writing, in form as required by law, purporting to show the name of every person there voted for, and the number of votes he there received, and the office for which he so received the same; and thereupon, to wit, on the day and year last aforesaid, within the county and judicial district aforesaid, one of the said poll-books, with such certificate thereon as aforesaid, and one of the said tally-lists, together constituting the return from the said poll of election, having been enveloped

and sealed up in a package, were put into the hands of one of the said judges of election, who thereupon then and there delivered the same, so enveloped and sealed up, to the county clerk of the said county of Cook and his several deputies, at the office of the said county clerk. And the said attorney of the said United States, who prosecutes as aforesaid, for the said United States further gives the court here to understand and be informed that Joseph C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl, late of Chicago aforesaid, afterwards, to wit, on the day and year
last aforesaid, within the county and judicial district aforesaid, un-
18 lawfully did conspire together and with divers other persons to
the said attorney as yet unknown, to break open the package aforesaid and to remove therefrom the said return therein contained, and to mutilate and alter the said certificate, and to make away with and destroy the said tally-list, and to substitute for and in place thereof a false and spurious paper writing in form of and purporting to be such tally-list; they the said Arthur Gleason and Henry Biehl and one of the said persons unknown then and there being deputies of the said county clerk, and by law charged with the duty of keeping safe and unopened and intact the said package and its contents aforesaid, and the same then still remaining sealed up in the office of the said county clerk, and the said return not then having been opened, canvassed, and published by the proper canvassing-officers of the county aforesaid.

And that to effect the object of the said conspiracy the said Arthur Gleason and Henry Biehl and the above-mentioned person unknown then and there (to wit, in the said county and judicial district) so being such deputies of the said county clerk, and charged with such duty as aforesaid, unlawfully did make opportunity for and permit the breaking open of the said package, and the removing of the said return therefrom, and the altering and falsifying of the said return: And that further to effect the object of the said conspiracy the said Joseph C. Mackin and William J. Gallagher then and there unlawfully did break open the package aforesaid, and remove therefrom the said return so therein contained: And that further to effect the object of the said conspiracy the said William J. Gallagher then and there unlawfully did mutilate and alter the said certificate, by erasing the word "four," in the sentence "Henry W. Leman had four hundred twenty votes for State senator," as originally written in the said certificate, and writing in place of the said word "four" the word "two," so as to make the said sentence read and appear to be "Henry W. Leman had two hundred twenty votes for State senator;" and by erasing the word "two," in the sentence "Rudolph Brand had two hundred seventy-four votes for State senator," as originally written in the said certificate, and writing in place of the same word "two" the word "four," so as to make that sentence read and appear to be "Rudolph Brand had four hundred seventy-four votes for State senator." And that further to effect the object of the said conspiracy the said William J. Gallagher then and there unlawfully did make a false and spurious paper writing in form of and purporting to be such tally-list as aforesaid, and the same false and spurious paper writing then and there unlawfully did substitute for and in place of the same tally-list, in the said county clerk's office. And that further to effect the object of the said conspiracy the said Joseph C. Mackin and William J. Gallagher then and there (to wit, in the said county and judicial district) unlawfully did make away with and destroy the same tally-list, against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

2. And the said attorney of the said United States, who prosecutes as aforesaid, for the said United States further gives the court here to understand and be informed that on the fourth day of November, in the year of our Lord eighteen hundred and eighty-four, a general election was held in the State of Illinois, as appointed by law, for the choosing of a Representative in the Congress of the said United States from each of the several
Congressional districts of the said State, and certain State and county
19 officers; and at a certain poll of the same election, to wit, the poll
of that election in and for the second election district of the Eighteenth ward of the city of Chicago, within the county of Cook and the judicial district aforesaid and the fourth Congressional district of the said State, a large number of ballots, in all amounting to six hundred ballots and upwards, were deposited by the respective voters at the same poll of election, being at once ballots for a Representative in the said Congress from the Congressional district aforesaid and for the various other officers there voted for; and afterwards, to wit, on the fifth day of November, in the same year, within the county and judicial district aforesaid, the proper judges and clerks of election made upon each of the poll-books of the same poll of election a certificate in writing, in form as required by law in that behalf, and the same judges of election then and there enveloped and sealed up in a package the said ballots so deposited at the poll of election last aforesaid; and thereupon the said ballots, so enveloped and sealed up, and one of the same poll-books, with such certificate thereon as aforesaid, were then delivered pursuant to law to the county clerk of the said county of Cook and his several deputies, at the office of the said county clerk, to wit, in the county and judicial district aforesaid.

And the said attorney of the said United States, who prosecutes as aforesaid, for the said United States, further gives the court here to understand and be informed that the said Joseph C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl, afterwards, to wit, on the day and year last aforesaid, within the county and judicial district aforesaid, unlawfully did conspire together, and with divers other persons to the said attorney as yet unknown, to break open the said package so containing the said ballots, and to remove from the same package a large number of the said ballots, and to make away with and destroy those ballots which should be so removed, and to substitute for and in place thereof a like number of false and spurious printed papers in form and resemblance of such ballots, and to remove from the said county clerk's office, and make away with and destroy, the poll-book and certificate last aforesaid, and to substitute for and in place of the same poll-book and certificate false and spurious paper writings in form of and purporting to be such poll-book and certificate respectively; they, the said Arthur Gleason and Henry Biehl, and one of the last-mentioned persons unknown, then and there being deputies of the said county clerk, and by law charged with the duty of keeping safe and unopened the last-mentioned package and its contents aforesaid, and safe and intact the poll-book and certificate last aforesaid; and the same package with its said contents then still being

sealed up, and remaining, with the same poll-book and certificate, in the said county clerk's office; and that to effect the object of the conspiracy last aforesaid the said Arthur Gleason and Henry Biehl and the said person unknown, as in this count mentioned, then and there (to wit, in the county and judicial district aforesaid), so being such deputies of the said county clerk, and charged with such duty as last aforesaid, unlawfully did make opportunity for and permit the breaking open of the last-mentioned package, and the removing from the same of a large number of the said ballots so therein contained, and the removing of the last-mentioned poll-book and certificate from the said county clerk's office; and that further to effect the object of the same conspiracy, the said Joseph C. Mackin then and there unlawfully did cause and procure to be printed a large
20 number, to wit, two hundred and upwards, of false and spurious papers, in form and resemblance of such ballots as aforesaid, to be substituted for and in place of the said ballots so intended to be removed, made away with, and destroyed as aforesaid; and that further to effect the object of the same conspiracy the said Joseph C. Mackin and William J. Gallagher then and there unlawfully did break open the package last aforesaid, and remove therefrom and make away with and destroy a large number, to wit, two hundred and upwards, of the said ballots so therein contained, and then and there unlawfully did substitute for and in place of the said ballots so removed, made away with, and destroyed a like number of false and spurious printed papers in form and resemblance of such ballots; and that further to effect the object of the same conspiracy the said Joseph C. Mackin and William J. Gallagher then and there unlawfully did remove from the said county clerk's office, and make away with, and destroy the poll-book and certificate last aforesaid; and that further to effect the object of the same conspiracy the said William J. Gallagher then and there (to wit, in the said county and judicial district), unlawfully did make a false and spurious paper writing in form of and purporting to be such poll-book as last aforesaid, and another false and spurious paper writing in form of and purporting to be such certificate as last aforesaid, and the two false and spurious paper writings last mentioned then and there unlawfully did substitute for and in place of the same poll-book and certificate, in the said county clerk's office, against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

3. And the said attorney of the said United States, who prosecutes as aforesaid, for the said United States further gives the court here to understand and be informed that on the fourth day of November, in the year of our Lord eighteen hundred and eighty-four, a general election was held in the State of Illinois, as appointed by law, for the choosing of Representatives in the Congress of the said United States and certain State and county officers; and at a certain poll of the same election, to wit, the poll of that election in and for the second election district of the Eighteenth ward of the city of Chicago, within the county of Cook and judicial district aforesaid and the Fourth Congressional district of the said State, a large number of votes, in all amounting to six hundred votes and upwards, were then cast by means of a like number of ballots then and there deposited by the respective voters at that poll of election, being votes and ballots at once for a Representative in the said Congress from the Con-

gressional district aforesaid and for the various other officers voted for at the same poll of election; and afterwards, to wit, on the fifth day of November, in the same year, within the county and judicial district aforesaid, a poll-book of the same poll of election, with the certificate thereon of the proper judges and clerks of election, in form as required by law, and a tally-list of the same poll of election, in form as required by law, were delivered pursuant to law to the county clerk of the said county of Cook, and his several deputies, at the office of the said county clerk; and at the same time the said ballots so deposited at the poll of election last aforesaid, and the other poll-book of the same poll of election, with the like certificate thereon of the proper judges and clerks of election, were also delivered
pursuant to law to the said county clerk, and his several deputies,
21 at the office of the said county clerk, to wit, in the county and
judicial district aforesaid.

And the said attorney of the said United States, who prosecutes as aforesaid, for the said United States further gives the court here to understand and be informed that the said Joseph C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl, afterwards, to wit, on the day and year last aforesaid, within the county and judicial district aforesaid, unlawfully did conspire and agree together, and with divers other persons to the said attorney as yet unknown, to mutilate and alter the said certificate on the poll-book in this count first mentioned, and to remove from the said county clerk's office, and destroy, the tally-list last aforesaid, and to substitute for and in place thereof a false and spurious paper writing in form and resemblance of such tally-list, and to remove from the same office, and destroy, a large number of the ballots last aforesaid, and to substitute for and in place of the same ballots which should be so removed and destroyed a like number of false and spurious printed papers in form and resemblance of such ballots, and to remove from the same office, and destroy, the other poll-book in this count mentioned, and the said certificate on the same poll-book, and to substitute for and in place of the same poll-book and certificate false and spurious paper writings in form of and purporting to be respectively such poll-book and certificate; they, the said Arthur Gleason and Henry Biehl, and one of the last-mentioned persons unknown, then and there being deputies of the said county clerk, and by law charged with the duty of keeping safe and intact in the said county clerk's office the poll-books, certificates, ballots, and tally-list in this count mentioned, and the same then still remaining in the said county clerk's office; and that to effect the object of the conspiracy last aforesaid the said Arthur Gleason and Henry Biehl and the said person unknown as in this count mentioned, then and there (to wit, in the said county and judicial district), so being deputies of the said county clerk, and charged with such duty as in this count aforesaid, unlawfully did make opportunity for and permit the removing of the tally-list in this count mentioned, and a large number, to wit, two hundred and upwards, of the ballots in this count mentioned, and the poll-book and certificate in this count secondly mentioned, from the said county clerk's office; and that further to effect the object of the same conspiracy the said Joseph C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl, and the last-mentioned person unknown, then and there (to wit, in the said county and judicial district) unlawfully did mutilate and alter the said certificate

on the poll-book in this count first mentioned by erasing the word "four" in the sentence "Henry W. Leman had four hundred twenty votes for State senator," as originally written in the same certificate, and writing in place of the said word "four" the word "two," so as to make that sentence read and appear to be "Henry W. Leman had two hundred twenty votes for State senator," and by erasing the word "two," in the sentence "Rudolph Brand had two hundred seventy-four votes for State senator," as originally written in the same certificate, and writing in place of the same word "two" the word "four," so as to make that sentence read and appear to be "Rudolph Brand had four hundred seventy-four votes for State senator;" and then and there unlawfully did remove from the said county clerk's office, and destroy, the tally-list last aforesaid, and substitute for and in place thereof a false and spurious paper writing in form and resemblance
of such tally-list; and then and there (to wit, in the said county
22 and judicial district) unlawfully did cause and procure to be printed
a large number, to wit, two hundred and upwards of false and spurious papers, in form and resemblance of such ballots as in this count mentioned, to be substituted for and in place of the said ballots so intended to be removed and destroyed as last aforesaid; and then and there unlawfully did remove from the said county clerk's office, and destroy, the poll-book and certificate in this count secondly mentioned, and substitute for and in place of the same poll-book and certificate false and spurious paper writings in form of and purporting to be respectively such poll-book and certificate, against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

4. And the said attorney of the said United States, who prosecutes as aforesaid for the said United States further gives the court here to understand and be informed that a general election having been held in the State of Illinois on the fourth day of November, in the year of our Lord eighteen hundred and eighty-four, as appointed by law, for the choosing of representatives in the Congress of the said United States and certain State and county officers, there was afterwards, to wit, on the fifth day of November, in the same year, remaining deposited in the office of the county clerk of the said county of Cook, and with the said county clerk, a certain return of the same election, to wit, the return from the poll of that election in and for the second election district of the Eighteenth ward of the city of Chicago within the county and judicial district aforesaid, and the Fourth Congressional district of the said State, at which poll of election a representative in the said Congress from the Congressional district aforesaid, amongst other officers, was voted for, the same return then consisting of a poll-book of the same poll of election, with the certificate thereon of the proper judges and clerks of election, in form as required by law, and a tally-list of the same poll of election, in form as required by law. And the said attorney of the said United States, who prosecutes as aforesaid, for the said United States further gives the court here to understand and be informed that the said Joseph C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl, afterwards, to wit, on the day and year last aforesaid, within the county and judicial district aforesaid, unlawfully did conspire together, and with divers other persons to the said attorney as yet unknown, to interfere with one Michael W. Ryan,

then being county clerk of the said county of Cook, and such two justices of the peace of the said county as he should associate with him for the purpose of opening and canvassing the several returns of the same election within the county aforesaid, in the discharge of the duties of them the said Michael W. Ryan, county clerk as aforesaid, and such two justices in that behalf, that is to say, before the opening and canvassing of the said return from the poll of election last aforesaid, to mutilate and alter the certificate last aforesaid, and to remove from the said county clerk's office, and destroy, the tally-list last aforesaid, and to substitute for and in place thereof a false and spurious paper writing in form of and purporting to be such tally-list, the same poll-book and certificate and tally-list then still remaining in the said county clerk's office; and that to effect the object of the conspiracy last aforesaid the said Joseph C. Mackin,
William J. Gallagher, Arthur Gleason, and Henry Biehl then and
23 there (to wit, in the said county and judicial district) unlawfully
did mutilate and alter the certificate last aforesaid, by erasing the word "four," in the sentence "Henry W. Leman had four hundred twenty votes for State senator," as originally written in the same certificate, and writing in place of the same word "four" the word "two," so as to make that sentence read and appear to be "Henry W. Leman had two hundred twenty votes for State senator," and by erasing the word "two" in the sentence "Rudolph Brand had two hundred seventy-four votes for State senator," as originally written in the same certificate, and writing in place of the same word "two" the word "four," so as to make that sentence read and appear to be "Rudolph Brand had four hundred seventy-four votes for State senator;" and then and there unlawfully did remove from the said county clerk's office, and destroy, the tally-list last aforesaid, and substitute for and in place thereof a false and spurious paper writing in form of and purporting to be such tally-list; and so the said attorney of the said United States, who prosecutes as aforesaid, for the said United States says that the said Joseph C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl, in manner and form in this count aforesaid, did conspire together, and with divers other persons to the said attorney as yet unknown, to interfere with officers of an election for representative in Congress in the discharge of the duties of those officers of election; and that the said Joseph C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl, in manner and form in this count aforesaid, did commit and do acts to effect the object of the same conspiracy, against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

5. And the said attorney of the said United States, who prosecutes as aforesaid, for the said United States further gives the court here to understand and be informed that a general election having been held in the State of Illinois, on the fourth day of November, in the year of our Lord eighteen hundred and eighty-four, as appointed by law, for the choosing of a representative in the Congress of the said United States from each of the several Congressional districts of the said State, and divers State and county officers, there were afterwards, to wit, on the fifth day of November, in the same year, remaining deposited in the office of the county clerk of the said county of Cook, and with the said county clerk, certain ballots which had been cast at a certain poll of the same election by

the respective voters there, to wit, the ballots cast at the poll of that election in and for the second election district of the Eighteenth ward of the city of Chicago, within the county and judicial district aforesaid, and the Fourth Congressional district of the said State, the same being ballots as well for a representative in the said Congress from that Congressional district as for divers State and county officers; and there was also then remaining deposited in the said county clerk's office, and with the said county clerk, a certain poll-book of the same poll of election, with the certificate in writing thereon of the proper judges and clerks of election, in form as required by law. And the said attorney of the said United States, who prosecutes as aforesaid, for the said United States further gives the court here to understand and be informed that the said Joseph C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl, on the day and year last aforesaid, within the county and judicial district
24 aforesaid, unlawfully did conspire together, and with divers other persons to the said attorney as yet unknown, to interfere with the said Michael W. Ryan, then being county clerk of the county aforesaid, in the discharge of his duties in that behalf, that is to say, unlawfully to remove from the said county clerk's office, and destroy, a large number of the ballots last aforesaid, and to substitute for and in place of the same ballots which should be so removed and destroyed a like number of false and spurious printed papers in form and resemblance of such ballots, and to remove from the same office, and destroy, the poll-book and certificate last aforesaid, and to substitute for and in place of the same poll-book and certificate false and spurious paper writings in form of and purporting to be respectively such poll-book and certificate; the said ballots so cast as last aforesaid, and the poll-book and certificate last mentioned, then still remaining so deposited in the office of and with the said county clerk; and that, to effect the object of the conspiracy last aforesaid, the said Joseph C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl then and there (to wit, in the said county and judicial district) unlawfully did remove from the said county clerk's office, and destroy, a large number, to wit, two hundred and upwards, of the ballots last aforesaid, and substitute for and in place of the same ballots so removed and destroyed a like number of false and spurious printed papers in form and resemblance of such ballots; and then and there (to wit, in the said county and judicial district) unlawfully did remove from the said county clerk's office, and destroy, the last-mentioned poll-book and certificate, and substitute for and in place of the same poll-book and certificate false and spurious paper writings in form of and purporting to be respectively such poll-book and certificate. And so the said attorney of the said United States, who prosecutes as aforesaid, for the said United States says that the said Joseph C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl, in manner and form in this count aforesaid, did conspire together, and with divers other persons to the said attorney as yet unknown, to interfere with an officer of an election for representative in Congress in the discharge of the duties of that officer of election; and that the said Joseph C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl, in manner and form in this count aforesaid, did commit and do acts to effect the object of the same conspiracy, against the peace and dignity of the said United

States, and contrary to the form of the statute of the same in such case made and provided.

6. And the said attorney of the said United States, who prosecutes as aforesaid, for the said United States further gives the court here to understand and be informed that a general election having been held in the State of Illinois on the fourth day of November, in the year of our Lord eighteen hundred and eighty-four, as appointed by law, for the choosing of representatives in the Congress of the said United States and certain State and county officers, there was on the fifth day of November, in the same year, remaining deposited in the office of the county clerk of the said county of Cook, and with the said county clerk, a certain return of the same election, to wit, the return from the poll of that election in and for the second election district of the Eighteenth ward of the city of Chicago, within the county and judicial district aforesaid, and the Fourth Congressional district of the said State, at which poll of election a representative in the said Congress from the Congressional district aforesaid,
25 amongst other officers, was voted for, a part of which return was
a certain tally-list in writing, in form as required by law. And the said attorney of the said United States, who prosecutes as aforesaid, for the said United States further gives the court here to understand and be informed that the said Joseph C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl, on the day and year last aforesaid, within the county and judicial district aforesaid, unlawfully did conspire together, and with divers other persons to the said attorney as yet unknown, to take and carry away the tally-list last aforesaid, with intent and for the purpose of stealing and destroying the same, and the same tally-list willfully to destroy; the return last aforesaid, including the last-mentioned tally-list, then remaining deposited in the office of and with the said county clerk as aforesaid; and that to effect the object of the conspiracy last aforesaid, the said Joseph C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl, and the last-mentioned persons unknown, then and there unlawfully did take and carry away the tally-list last aforesaid, with intent and purpose to steal and destroy the same, and the same tally-list then and there unlawfully did willfully destroy; and that further to effect the object of the same conspiracy, the said Joseph C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl, and the last-mentioned persons unknown, then and there unlawfully did make, and cause to be made, a false and spurious paper writing in form of and purporting to be such tally-list as last aforesaid, and the same false and spurious paper writing then and there unlawfully did substitute for and in place of the last-mentioned tally-list in the said county clerk's office. And so the said attorney of the said United States, who prosecutes as aforesaid, for the said United States says that the said Joseph C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl, in manner and form as in this count aforesaid, did conspire together, and with divers other persons to the said attorney as yet unknown, to take and carry away, with intent to steal and destroy, a paper, document, and record deposited in a public office, and with a public officer, and to destroy the same paper, document, and record so deposited; and that the said Joseph C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl, and the same persons unknown, in manner and form in this count aforesaid, did commit and do acts to effect the object of the

same conspiracy, against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

7. And the said attorney of the said United States, who prosecutes as aforesaid, for the said United States further gives the court here to understand and be informed that a general election having been held in the State of Illinois on the fourth day of November, in the year of our Lord eighteen hundred and eighty-four, as appointed by law, for the choosing of a representative in the Congress of the said United States from each of the several Congressional districts of the said State, and divers State and county officers, there were on the fifth day of November, in the same year, remaining deposited in the office of the county clerk of the said county of Cook, and with the said county clerk, certain ballots which had been cast at a certain poll of the same election by the respective voters there, to wit, the ballots cast at the poll of that election in and for the second election district of the Eighteenth ward of the city of Chicago, within the county and judicial district aforesaid, and the Fourth Congressional
26 district of the said State; the same being at once ballots for a representative in the said Congress from that Congressional district and for divers State and county officers; and there was also then remaining deposited in the said county clerk's office, and with the said county clerk, a certain poll-book of the same poll of election, with the certificate in writing thereon of the proper judges and clerks of election, in form as required by law. And the said attorney of the said United States, who prosecutes as aforesaid, for the said United States further gives the court here to understand and be informed that the said Joseph C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl, on the day and year last aforesaid, within the county and judicial district aforesaid, unlawfully did conspire together, and with divers other persons to the said attorney as yet unknown, to take and carry away a large number of the ballots last aforesaid, and the last-mentioned poll-book and certificate, with intent and for the purpose of stealing and destroying the same ballots which should be so taken and carried away, and the same poll-book and certificate, and willfully to destroy the same ballots, poll-book and certificate; the said ballots so cast as last aforesaid, and the poll-book and certificate last mentioned, then remaining so deposited in the office of and with the said county clerk as aforesaid; and that to effect the object of the conspiracy last aforesaid the said Joseph C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl, and the last-mentioned persons unknown, then and there (to wit, in the said county and judicial district) unlawfully did take and carry away, with intent and for the purpose of stealing and destroying, two hundred and upwards of the ballots last aforesaid, and the poll-book and certificate last aforesaid, and the same two hundred ballots and upwards and the same poll-book and certificate then and there unlawfully did willfully destroy; and that further to effect the object of the same conspiracy, the said Joseph C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl, and the last-mentioned persons unknown, then and there unlawfully did cause and procure to be printed a large number, to wit, two hundred and upwards, of false and spurious papers in form and resemblance of such ballots as last aforesaid, and the same false and spurious papers then and there unlawfully did substitute for and in place

of the said ballots so taken and carried away and destroyed as in this count mentioned, in the said county clerk's office; and that further to effect the object of the same conspiracy the said Joseph C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl, and the last-mentioned persons unknown, then and there (to wit, in the said county and judicial district) unlawfully did make, and cause to be made, two false and spurious paper writings in form of and purporting to be respectively the poll-book and certificate last aforesaid, and the same false and spurious paper writings, then and there unlawfully did substitute for and in place of the same poll-book and certificate respectively in the said clerk's office. And so the said attorney of the said United States, who prosecutes as aforesaid, for the said United States says that the said Joseph C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl, in manner and form in this count aforesaid, did conspire together, and with divers other persons to the said attorney as yet unknown, to take and carry away, with intent and purpose of stealing and destroying, papers, documents, and records deposited in a public office, and with a public officer, and willfully to destroy the same papers, documents, and records so deposited;
27 and that the said Joseph C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl, and the same persons unknown, in manner and form in this count aforesaid, did commit and do acts to effect the object of the same conspiracy, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

Whereupon the said attorney of the said United States, who prosecutes as aforesaid, for the said United States prays the consideration of the court here in the premises, and that due process of law may be awarded against them, the said Joseph C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl in this behalf, to make them answer to the said United States concerning the premises aforesaid.

RICHARD S. TUTHILL,
United States Attorney.

(Endorsed:) Information (criminal) on Sec. 5440, R. S. Filed January 20, A. D. 1885. Wm. H. Bradley, clerk. Bail, $10,000.00. H. W. B., judge.

On the same day, to wit, on the twentieth day of January, 1885, there issued out of said clerk's office a bench warrant in said entitled cause, which said bench warrant, together with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

28 *Bench warrant.*

DISTRICT COURT OF THE UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you to take Joseph C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl, if they shall be found in your district, and them safely keep, so that you have their bodies before our judge of our district court of the United States for the northern district of Illinois, at Chicago, in the district aforesaid, forthwith to answer unto the United States of America in a criminal information pending in said court against them for violation of section 5440 of the Revised Statutes of the United States; and have you then and there this writ, with your return thereon.

Witness, the Hon. Henry W. Blodgett, judge of the district court of the United States of America, at Chicago aforesaid, this twentieth day of January, in the year of our Lord one thousand eight hundred and eighty-five, and of our Independence the one hundred and ninth year.

[SEAL.] WM. H. BRADLEY,
Clerk.

The marshal is directed to take bail of the defendants in the sum of ten thousand dollars each.

WM. H. BRADLEY,
Clerk.

Marshal's return.

I have served the within writ by arresting the within named William J. Gallagher, and have taken bail in the sum of ten thousand dollars this 20th day of January, 1885.

A. M. JONES,
U. S. Marshal.
R. D. SHERMAN, *Dpt.*

(Endorsed:) Filed Jan'y 27th, A. D. 1885. Wm. H. Bradley, clerk.

28½ Afterwards, to wit, on the twenty-seventh day of January, 1885, came Joseph C. Mackin and Henry Biehl and Wm. J. Gallagher, by their attorneys, and filed in said clerk's office their motion to vacate and set aside the information in said entitled cause, which said motions are in the words and figures following, to wit:

Motion.

In the district court of the United States of America, northern district of Illinois, December term, 1884.

Motion to vacate and set aside information.

JOSEPH C. MACKIN, WM. J. GALLAGHER, ARTHUR GLEASON, and HENRY BIEHL
ads.
THE UNITED STATES OF AMERICA.

And now comes Joseph C. Mackin and Henry Biehl, defendants in the above cause, in person and by attorney, and moves the court for a rule or order that the information in this suit, and each and every count thereof, be vacated, annulled, and set aside, for the following reasons:

1st. Because the said information, and the several counts thereof, and each of them, fail to state facts and circumstances sufficient in judgment of law to constitute a crime within the true intent and meaning of the provision of that section of the statute (section 5440 R. S.) on which the information is attempted to be founded.

2d. Because the said several counts in said information, and each of them, are fatally defective in failing to state or aver any intent on part and behalf of said defendants to cheat, wrong, or defraud the voters of the Fourth Congressional district of the State of Illinois out of their choice for Congressman, by them duly elected and chosen at the election in said information stated and set forth.

3d. Because it does not appear from an inspection of the information that the legal votes cast at said election, and alleged to have been abstracted, and the spurious votes alleged to have been substituted therefor, changed in the least, the votes cast by the legal voters of said Congressional district for Congressman, or that the right of the Con- 29 gressman so elected at said election was in any way affected by such substitution; hence the conspiracy as set forth in said information was productive of no injury whatever, either to the voters of said district who voted for said Congressman, the Congressman then and there duly elected by them, or the United States.

4th. Because the offense attempted to be charged in this information, being a conspiracy to commit an offense against the laws of the United States, and the law requiring some act to be done by some one or all of the conspirators to complete the crime, the acts in carrying out such conspiracy should be specifically alleged, so that from an inspection of the record the court can see clearly that the statutes of the United States in regard to the election of Congressman has been violated.

5th. Because, in setting out the acts of conspiracy, the prosecuting attorney has taken extraordinary pains to show that this court has no jurisdiction of the subject-matter stated in this information. The allegations and facts stated show clearly that the conspirators had for their object and purpose a design only to change the vote for State senator; this being an offense exclusively against the laws of the State of Illinois, jurisdiction belongs exclusively to her State courts to try that offense.

6th. Because conspiracy consists in the doing of an unlawful act, with an evil or felonious intent. If, then, the stealing of ballots is not the subject of larceny, then the stealing of them is no crime. If the removing, mutilating, and destroying them is a crime, they being deposited with the clerk of the county of Cook and State of Illinois, the removing, mutilating, and destroying of them was an offense against the laws of the State of Illinois only. Hence the court has no jurisdiction to try said offense.

F. D. TURNER,
Att'y for Def'ts Mackin & Biehl.

(Endorsed:) Filed January 27, 1885. Wm. H. Bradley, clerk.

30 *Motion to quash.*

UNITED STATES OF AMERICA,
Northern District of Illinois:

In the district court of the United States.

THE UNITED STATES
vs.
WILLIAM J. GALLAGHER, IMPLEADED.
} Information under sec. 5544.

Now comes the said William J. Gallagher, in his own proper person, as well as by Thomson & Felsenthal, his attorneys, and moves this honorable court to quash the information herein against him and every count thereof, for that:

1. Said information doth not set forth in sufficient legal form the facts constituting any offense against the laws of the United States.

2. That every count in said information is defective and insufficient, in that it does not set forth facts, properly pleaded, constituting any offense whatever against the laws of the United States.

3. That by the facts set forth in said information and in every count thereof it is apparent that this honorable court has no jurisdiction of the alleged criminal acts set forth as aforesaid.

4. For the defects apparent upon the face of said information and every count thereof.

5. That said information and every count thereof is bad for uncertainty and indefiniteness.

WILLIAM J. GALLAGHER,
By THOMSON AND FELSENTHAL.

(Endorsed:) Filed January 27, 1885. Wm. H. Bradley, clerk.

On the same day, to wit, on the twenty-seventh day of January, 1885, in the December term of said court, 1884, in the record of the proceedings thereof, in said entitled cause, before Hon. Henry W. Blodgett, judge, is the following entry, to wit:

31 *Order.*

THE UNITED STATES OF AMERICA
vs.
JOSEPH C. MACKIN, WILLIAM J. GALLAGHER, Henry Biehl, and Arthur Gleason.
} Criminal information.

Now come the district attorney and the defendants Joseph C. Mackin and Henry Biehl in proper person and by Mr. Turner, their attorney, and the defendant William J. Gallagher by Henry W. Thomson, esq., his attorney, and the motion filed herein of the defendants Mackin and Biehl to set aside and vacate the information herein, and the motion filed herein of the defendant Gallagher to quash said information now coming on to be heard, after hearing the attorneys of said defendants, the court being now fully advised upon both of said motions, overrules the same, to which said defendants by their said attorneys now except, and the defendants Mackin and Biehl being now arraigned upon said information, for plea thereto each says for himself that he is not guilty in manner and form as therein charged. And the defendant William J. Gallagher, by Henry W. Thomson, esq., his attorney, enters his plea of not guilty to said information in manner and form as therein charged.

And it is ordered by the court that the trial of this cause be set for the fifth day of February next.

Afterward, to wit, on the fourth day of February, 1885, in the December term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, judge, are the following entries, to wit:

Order.

The United States of America
vs.
Joseph C. Mackin et al.
Criminal information.

On motion of the district attorney it is ordered by the court that
Michael W. Ryan, county clerk for the county of Cook, in this
32 district, produce forthwith before this court, or cause to be so pro-
duced, all papers and documents whatever (including poll-books, certificates, tally-lists, and ballots, with their respective envelopes) constituting or pertaining to, or purporting to constitute or pertain to, the returns of the last general election in this State from the second election district of the Eighteenth ward of the city of Chicago, and that when such papers and documents shall be so produced the same remain in the custody of the clerk of this court until final disposition of this cause or the further order of the court; and in case of the absence of said Michael W. Ryan, the said papers and documents be so produced by any deputy clerk having charge or custody of the same.

Order.

The United States of America
vs.
Joseph C. Mackin et al.
Criminal information.

It appearing to the court that due service of the order heretofore on this day made in this cause has been made upon Michael W. Ryan, county clerk therein named, and that he has hitherto refused to obey the said order, and still refuses to obey the same: Now, on motion of the district attorney, it is ordered by the court that the said Michael W. Ryan forthwith show cause, if any he have, why he should not be attached for a contempt of the court in not obeying the order aforesaid.

On the same day, to wit, on the fourth day of February, 1885, in the December term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, judge, is the following entry, to wit:

Order.

United States of America
vs.
Joseph C. Mackin, &c.

It appearing to the court that due service has been made of the order heretofore on this day entered herein, requiring Michael W. Ryan, county clerk, to show cause why he should not be attached for contempt of the court in not obeying the former order thereof in this behalf, and the said Michael W. Ryan still failing to show cause as aforesaid, or to appear, or in any way to excuse himself for not obeying the said order to show cause: Now, on motion of the district attorney, it is ordered by the court that a writ of attachment issue in this behalf for the body of the said Michael W. Ryan, returnable forthwith.

On the same day, to wit, on the fourth day of February, 1885, there were filed in said clerk's office two certified copies of orders entered of record February 4, 1885, in said entitled cause, which said certified copies, together with the return of the marshal thereto attached, are in the words and figures following, to wit:

33 United States district court, northern district of Illinois.

WEDNESDAY, *February* 4, *A. D.* 1885.

Present, the Hon. Henry W. Blodgett, judge.

THE UNITED STATES OF AMERICA
vs.
JOSEPH C. MACKIN ET AL.
} Criminal information.

On motion of the district attorney it is ordered by the court that Michael W. Ryan, county clerk for the county of Cook, in this district, produce forthwith before this court, or cause to be so produced, all papers and documents whatever (including poll-books, certificates, tally-lists, and ballots, with their respective envelopes) constituting or pertaining to, or purporting to constitute or pertain to, the returns of the last general election in this State from the second election district of the Eighteenth ward of the city of Chicago; and that when such papers and documents shall be so produced the same remain in the custody of the clerk of this court until final disposition of this cause or the further order of the court, and in case of the absence of said Michael W. Ryan the said papers and documents be so produced by any deputy clerk having charge or custody of the same.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the district court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the order entered of record in said court on the 4th day of February, A. D. 1885, in the cause wherein the United States of America is the complainant and Joseph C. Mackin et al. are the defendants, as the same appears from the original records of said court now remaining in my custody and control

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this 4th day of February, A. D. 1885.

WM. H. BRADLEY, *Clerk.*

34 *Special deputy's return.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Know all men by these presents, that I have appointed, and by these presents do appoint, George N. Jones my true and lawful deputy to execute the annexed writ, United States of America v. Joseph C. Mackin et al., and to make return of the execution thereof according to law.

A. M. JONES, [SEAL.]
U. S. Marshal for the Northern District of Illinois.

I have served the annexed writ in the following manner, to wit: By reading the same to and in the presence and the hearing of, and also by delivering a true copy thereof to, Michael W. Ryan, clerk of the county of Cook, in this district, on the 4th day of February, A. D. 1885.

A. M. JONES,
United States Marshal,
By GEO. N. JONES,
Special Deputy.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Geo. N. Jones, being duly sworn, deposes and says that he served the annexed writ as stated in the foregoing return, and that the expense returned by him in addition to the fees was actually incurred, and that the same is according to law.

GEO. N. JONES.

Subscribed and sworn to before me this 4th day of February, A. D. 1885.

[SEAL.] SAMUEL C. HAYES,
Notary Public.

(Endorsed:) Filed Feb'y 4, 1885. Wm. H. Bradley, clerk.

35 District court of the United States, northern district of Illinois.

WEDNESDAY, *February* 4, 1885.

Present, the Hon. Henry W. Blodgett, judge.

THE UNITED STATES OF AMERICA
v.
JOSEPH C. MACKIN ET AL.
} Criminal information.

It appearing to the court that due service of the order heretofore on this day made in this cause has been made upon Michael W. Ryan, county clerk, therein named, and that he has hitherto refused to obey the said order, and still refuses to obey the same. Now, on motion of the district attorney, it is ordered by the court that the said Michael W. Ryan forthwith show cause, if any he have, why he should not be attached for a contempt of the court in not obeying the order aforesaid.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the district court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the order entered of record in said court on the 4th day of February, A. D. 1885, in the cause wherein the United States of America are the complainant and Joseph C. Mackin et al. are the defendants, as the same appears from the original records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at my office in Chicago, in said district, this 4th day of February, A. D. 1885.

[SEAL.] WM. H. BRADLEY, *Clerk.*

(Endorsed:) Filed February 4, 1885. Wm. H. Bradley, clerk.

36 *Special deputy's return.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Know all men by these presents that I have appointed, and By these presents do appoint, Geo. N. Jones, my true and lawful deputy to execute the annexed writ, the United States of America vs. Joseph C. Mackin et al., and to make return of the execution thereof according to law.

A. M. JONES, [SEAL.]
U. S. Marshal for the Northern District of Illinois.

I have served the annexed writ in the following manner, to wit: by reading the same to and in the presence and the hearing of Michael W. Ryan, county clerk, therein named, on the 4th day of February, A. D. 1885, at the hour of 3.10 p. m. I did not serve the other defendant therein named, being unable to find within my district.

A. N. JONES,
United States Marshal,
By GEO. N. JONES,
Special Deputy.

MARSHAL'S FEES.

Copies	$
1 miles	06
1 service	2 00
Oath and certificate of service	
	$2 06

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Geo. N. Jones, being duly sworn, deposes and says that he served the annexed writ, as stated in the foregoing return, and that the expense returned by him, in addition to the fees, was actually incurred, and that the same is according to law.

GEO. N. JONES.

Subscribed and sworn to before me this 4th day of February, A. D. 1885.

[SEAL.] SAMUEL C. HAYES,
Notary Public.

Afterwards, to wit, on the fifth day of February, 1885, came Wm. J. Gallagher, by his attorney, and filed in said clerk's office his bill of exceptions in said entitled cause, which said bill of exceptions is in the words and figures following, to wit:

37 *Bill of exceptions of William J. Gallagher.*

THE UNITED STATES
vs.
WILLIAM J. GALLAGHER, JOSEPH C. MACKIN et al. } Information 1033.

Be it remembered that this cause coming on this 5th day of February, A. D. 1885, to be tried upon the issues joined, the parties being present, the court ordered a call of the jurors, whereupon of the fifty-five persons named in the venire and subpœnaed as jurors for the December term, A. D. 1884, of said district court, but twenty-seven persons appeared and responded. Thereupon the court ordered the marshal to call jurors to fill the panel for the trial of this cause, and the marshal proceeded to call twelve jurors from said panel into the jury box, when the defendant Gallagher objected and moved the court that the clerk be directed to write the name of each juror on a separate ticket and put the whole in a box or other place of safe-keeping, and that in the presence of the court the names of the jurors be drawn by chance from said box or place of safe-keeping, pursuant to the statute of the State of Illinois, in such case made and provided, and that in like manner such drawing by chance be continued until the panel was filled pursuant to *to* said statute; which motion the court then and there overruled, and directed the marshal to proceed with the call of the jurors according to the usual practice of the court, to which ruling of the court the defendant Gallagher then and there excepted, and thereupon the marshal, according to the practice of the court, proceeded to call the jurors for the trial of this cause, and all the jurors on the panel were called before the panel for the trial of this cause was obtained.

And forasmuch as the matters and things herein set forth do not appear of record in this cause, the defendant Gallagher presents this his bill of exceptions, and prays the court to sign and seal the same, and order that it b*y* made part of the record herein; which is accordingly done.

H. W. BLODGETT,
Judge.

(Endorsed:) Filed February 5, 1885. Wm. H. Bradley, clerk.

38 Also, to wit, on the fifth day of February, 1885, in the December term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, judge, is the following entry, to wit:

Order.

THE UNITED STATES OF AMERICA
vs.
JOSEPH C. MACKIN, WILLIAM J. GALLAGHER, Arthur Gleason, and Henry Biehl. } Criminal information.

Now come the district attorney, and I. N. Stiles, and J. B. Hawley, on the part of the prosecution, and now come also the defendants, Joseph C. Mackin, William J. Gallagher, Arthur Gleason and Henry Biehl, in their own proper persons, and the defendant, Joseph C. Mackin, by F. D. Turner and David Turpie, his attorneys, and the defendant Willian J. Gallagher, by Henry W. Thomson, his attorney, and the defendant Arthur Gleason, by Swett & Grosscup, his attorneys, and the defendant Henry Biehl, by F. D. Turner and William S. Young, his attorneys; and the defendant, Joseph C. Mackin, by his attorneys moves the court, upon affidavit filed, to postpone the trial of this cause; and after hearing the arguments of the counsel on behalf of said defendant Mackin and the district attorney, the court being now fully advised upon said motion, overrules

the same, to which the defendant Mackin, by his attorney, now excepts, and upon issue joined upon the pleas of said defendants heretofore entered herein, thereupon come a jury of good and lawful men, to wit, Seymour M. Arnold, Charles Hunt, George W. Parker, James Carr, Albert M. Weaver, Charles E. Smiley, John N. Hills, D. W. Wilson, Thomas Brownlee, A. W. Thompson, George B. Vastine, and Charles Welch, who were all duly elected, tried, and sworn well and truly to try said issues, and after hearing the opening statements in behalf of the prosecution and the defendant, Joseph C. Mackin, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until ten o'clock to-morrow morning, and it is ordered that George W. Jones,
39 a sworn officer of this court, and who has been sworn for this purpose, take charge of the jury and return them into court at ten o'clock to-morrow morning.

Afterwards, to wit, on the sixth day of February, 1885, in the December term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, judge, is the following entry, to wit:

Order.

THE UNITED STATES OF AMERICA
vs. } Criminal information.
JOSEPH C. MACKIN ET AL.

Now come again the district attorney and I. N. Stiles and J. B. Hawley, and come the defendants, Joseph C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl in proper person and by their said attorneys, and now come also the jury in this behalf empaneled and sworn, and in charge of said officer, and after hearing the opening statements of the counsel on behalf of the defendant William J. Gallagher, and Arthur Gleason and Henry Biehl, and a part of the evidence on behalf of the prosecution, the hour of adjournment having arrived, it is ordered that the further trial of this cause be postponed until to-morrow morning at 10 o'clock, and that said George N. Jones take charge of the jury and return them into court upon the meeting thereof, to-morrow morning.

Afterwards, to wit, on the seventh day of February, 1885, in the December term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, judge, is the following entry, to wit:

Order.

THE UNITED STATES OF AMERICA
vs. } Criminal information.
JOSEPH C. MACKIN ET AL.

Now come again the district attorney and I. N. Stiles and J. B.
40 Hawley on the part of the prosecution, and the defendants, Joseph C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl in proper person and by their said attorneys, and now come also the jury in this behalf empaneled and sworn, and in charge of said officer,

and after hearing additional evidence on behalf of the prosecution, without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until Monday morning next at ten o'clock, and that said George N. Jones take charge of the jury and return them into court on Monday morning next at ten o'clock.

Afterwards, to wit, on the 9th day of February, 1885, in the December term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, judge, is the following entry, to wit:

Order.

THE UNITED STATES OF AMERICA
vs.
JOSEPH C. MACKIN ET AL.
} Criminal information.

Now come again the district attorney and I. N. Stiles and J. B. Hawley, on the part of the prosecution, and the defendants, Joseph C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl, in proper person and by their said attorneys, and now come also the jury in this behalf empaneled and sworn, and in charge of the officer duly sworn, and after hearing additional evidence on the part of the prosecution, without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning at ten o'clock, and that George N. Jones, who has been duly sworn for that purpose, take charge of the jury and return them into court to-morrow morning at ten o'clock.

Afterwards, to wit, on the 10th day of February, 1885, in the December term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, judge, is the following entry, to wit:

41 *Order.*

THE UNITED STATES OF AMERICA
vs.
JOSEPH C. MACKIN ET AL.
} Criminal information.

Now come again the district attorney and I N. Stiles and J. B. Hawley, on the part of the prosecution, and the defendants, Joseph C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl, in proper person and by their said attorneys, and come also the jury in this behalf empaneled and sworn, and in charge of the officer aforesaid, and after hearing additional evidence on the part of the prosecution, without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning at ten o'clock, and that George N. Jones, who has been duly sworn for that purpose, take charge of the jury and return them into court to-morrow morning at ten o'clock.

Afterwards, to wit, on the eleventh day of February, 1885, in the December term of said court 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, judge, is the following entry, to wit:

Order.

THE UNITED STATES OF AMERICA }
vs. } Criminal information.
JOSEPH C. MACKIN ET AL }

Now come again the district attorney and I. N. Stiles and J. B. Hawley, attorneys on the part of the prosecution, and the defendants, Joseph C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl, in proper person and by their said attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial of this cause be postponed until ten o'clock to-morrow morning, and that George N. Jones, the officer aforesaid, take charge of the jury and return them into to-morrow morning at ten o'clock.

42 Afterwards, to wit, on the twelfth day of February, 1885, in the December term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, judge, is the following entry, to wit:

Order.

THE UNITED STATES OF AMERICA }
vs. } Criminal information.
JOSEPH C. MACKIN. }

Now come again the district attorney and I. N. Stiles and J. B. Hawley, the attorneys for the prosecution, and the defendants, Joseph C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl, in their own proper persons, and by their said attorneys, and now come also the jury in this behalf empaneled and sworn, and in charge of the officer aforesaid, and after hearing the concluding direct evidence on the part of the prosecution, by agreement it is ordered that the jury be excused until to-morrow morning at ten o'clock, and that George N. Jones, the officer aforesaid, take charge of the jury and return them into court to-morrow morning at ten o'clock. And the said defendants, by their attorneys, move the court to instruct the jury to return a verdict of not guilty, and after hearing a part of the arguments of the defendants' counsel in support of said motion, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning at ten o'clock.

Afterwards, to wit, on the thirteenth day of February, 1885, in the December term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

THE UNITED STATES OF AMERICA *vs.* JOSEPH C. MACKIN ET AL. } Criminal information.

Now come again the district attorney and I. N. Stiles and J. B. 43 Hawley, attorneys for the prosecution, and the defendants, Joseph C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl, in proper person, and by their said attorneys, and the motion of the defendants for the court to instruct the jury to return a verdict of not guilty now coming on to be further heard, and the attorneys of the defendants have nothing further to say, the court being now fully advised in the premises, overrules said motion, to which the defendants by their attorneys now except.

And now come again the jury in this behalf empaneled and sworn, and after hearing a part of the evidence on behalf of the defendants, the hour of adjournment having arrived, it is ordered that the further trial of this cause be postponed until to-morrow morning, at ten o'clock, and that George N. Jones, the officer aforesaid, take charge of the jury and return them into court to-morrow morning, at ten o'clock.

Afterwards, to wit, on the fourteenth day of February, 1885, in the December term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, judge, is the following entry, to wit:

Order.

THE UNITED STATES OF AMERICA *vs.* JOSEPH C. MACKIN ET AL. } Criminal information.

Now come again the district attorney and I. N. Stiles and J. B. Hawley, attorneys for the prosecution, and the defendants, Joseph C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl, in proper person, and by their said attorneys, and now come also the jury in this behalf empaneled and sworn, and in charge of the officer aforesaid, and after hearing additional evidence on the part of the defendants, without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until Monday morning next at ten o'clock, and that George N. Jones, the officer aforesaid, take charge of the jury and return them into court Monday morning next at ten o'clock.

44 Afterwards, to wit, on the sixteenth day of February, 1885, in the December term of said court, 1884, in the record of the pro-

ceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, judge, is the following entry, to wit:

Order.

THE UNITED STATES OF AMERICA
vs. } Criminal information.
JOSEPH C. MACKIN ET AL.

Now come again the district attorney and I. N. Stiles and J. B. Hawley, attorneys for the prosecution, and the defendants, Joseph C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl, in proper person, and by their said attorneys, and now come also the jury in this behalf empaneled and sworn and in charge of the officer aforesaid, and after hearing additional evidence on the part of the defendants, without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow at ten o'clock, and that George N. Jones, the officer aforesaid, take charge of the jury and return them into court to-morrow morning at ten o'clock.

Afterwards, to wit, on the seventeenth day of February, 1885, in the December term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, judge, is the following entry, to wit:

Order.

THE UNITED STATES OF AMERICA
vs. } Criminal information.
JOSEPH C. MACKIN ET AL.

Now come again the district attorney and Isaac N. Stiles and J. B.
Hawley, attorneys for the prosecution, and the defendants, Joseph C.
Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl, in
proper person and by their said attorneys, and now come also the jury in
this behalf empaneled and sworn, and after hearing additional evi-
45 dence on the part of the defendants, without concluding the same,
the hour of adjournment having arrived, it is ordered that the fur-
ther trial of this cause be postponed until to-morrow morning at ten
o'clock, and that George N. Jones, the officer aforesaid, take charge of the
jury and return them into court to-morrow morning at ten o'clock.

Afterwards, to wit: on the eighteenth day of February, 1885, in the December term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, judge, is the following entry, to wit:

Order.

THE UNITED STATES OF AMERICA
vs. } Criminal information.
JOSEPH C. MACKIN ET AL.

Now come again the district attorney and Isaac N. Stiles and J. B. Hawley, attorneys for the prosecution, and the defendants, Joseph C.

Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl in proper person, and by the said attorney; and now come also the jury in this behalf empaneled and sworn, and in charge of the officer aforesaid, and after hearing the concluding evidence on the part of the defendants and the rebutting evidence on the part of the prosecution, and a part of the arguments of counsel, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning at ten o'clock, and that George N. Jones, the officer aforesaid, take jury and return them into court to-morrow morning at ten o'clock.

Afterwards, to wit, on the nineteenth day of February, 1885, in the December term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, judge, is tho following entry, to wit:

Order.

THE UNITED STATES OF AMERICA *vs.* JOSEPH C. MACKIN ET AL. } Criminal information.

Now come again the district attorney and Isaac N. Stiles and J.
46 B. Hawley, attorneys for the prosecution, and the defendants, Joseph
C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl in proper person and by their said attorneys, and now come also the jury in this behalf empaneled and sworn, and in charge of the officer aforesaid, and after hearing additional arguments without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning at ten o'clock, and that George N. Jones, the officer aforesaid, take charge of the jury and return them into court to-morrow morning.

Afterwards, to wit, on the twentieth day of February, 1885, in the December term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, judge, is the following entry, to wit:

Order.

THE UNITED STATES OF AMERICA *vs.* JOSEPH C. MACKIN ET AL. } Criminal information.

Now come again the district attorney and Isaac N. Stiles and J. B. Hawley, attorneys for the prosecution, and the defendants, Joseph C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl, in proper person and by their said attorneys, and now come also the jury in this behalf empaneled and sworn, and in charge of the officer aforesaid, and after hearing the additional arguments of counsel, without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning at ten o'clock, and that the officer aforesaid take charge of the jury, and return them into court to-morrow morning.

Afterwards, to wit, on the twenty-first day of February, 1885, in the December term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, judge, is the following entry, to wit:

47 *Order.*

THE UNITED STATES OF AMERICA
vs.
JOSEPH C. MACKIN, WILLIAM J. GALLAGHER,
Arthur Gleason, and Henry Biehl.
} Criminal information.

Now come again the district attorney and I. N. Stiles and J. B. Hawley, attorneys for the prosecution, and the defendants, Joseph C. Mackin, William J. Gallagher, Arthur Gleason, and Henry Biehl, in proper person and by their attorneys, and now come also the jury in this behalf empaneled and sworn, and in charge of George N. Jones, the officer aforesaid, and after hearing the concluding arguments of counsel and receiving the instructions of the court, the jury in charge of said officer retired to consider of their verdict, and, after a short absence, come again the said attorneys for the prosecution, and the defendants, Joseph C. Mackin, William J. Gallagher, and Henry Biehl, in their own proper persons, and the said Gallagher and Biehl by their said attorneys, and come also the jury in this behalf empaneled and sworn, and in charge of the officer aforesaid, and the jury returned the following verdict: We, the jury, find the defendants, Joseph C. Mackin, William, J. Gallagher, and Arthur Gleason guilty as charged in the information, and the defendant, Henry Biehl, not guilty. And on motion of Joseph C. Mackin and William J. Gallagher the jury was polled, and in answer to the question put to them separately by the clerk, "Was this and is it now your verdict?" each for himself answered in the affirmative.

And thereupon the defendants, Joseph C. Mackin and William J. Gallagher, by Henry W. Thomson, esq., their attorney, move the court for a new trial herein.

And the district attorney moves the court that the defendants so found guilty be taken into custody, and the defendants, Joseph C. Mackin and William J. Gallagher, by their attorney, move the court that they be allowed to give bail, which last motion is sustained, and it is ordered 48 that said defendants, Joseph C. Mackin and William J. Gallagher, be allowed to give bail, and that said bail be fixed at the sum of twenty thousand dollars each.

And on motion of the defendant, Henry Biehl, by his attorney, for judgment upon said verdict as to him, it is thereupon considered and adjudged by the court that the defendant, Henry Biehl, be discharged, and that he go hence without day.

Thereupon the defendants, Gallagher and Mackin, filed motions for new trial, which motions are in the words and figures following, to wit:

Motion for new trial.

(Gallagher.)

THE UNITED STATES OF AMERICA,
Northern District of Illinois:

THE UNITED STATES
vs.
WILLIAM J. GALLAGHER, IMPLEADED.

And now comes the defendant, William J. Gallagher, in his own proper person, as well as by Thomson & Felsenthal, his attorneys, and moves this honorable court to set aside the verdict herein against him and for a new trial for that:

1. The said verdict is not supported by the evidence in the cause.
2. That said verdict is against the evidence in the cause.
3. That said verdict is against the law.
4. There was no proof in the cause showing or tending to show that this defendant was guilty of any offense against the laws of the United States.
5. That in the charge to the jury the court, in summing up, erred as to the facts of the case, to the great prejudice of this defendant.
6. That the court erred in charging the jury as to the law of the case.
7. That the court erred in refusing to charge the jury as prayed by this defendant.

49 8. For other errors to the prejudice of this defendant, in the admission against his objection of irrelevant and improper evidence, and in the exclusion of testimony material to his defense, offered by this defendant; and

9. That this honorable court hath not jurisdiction to enter judgment upon the verdict herein against this defendant.

WILLIAM J. GALLAGHER,
By THOMAS & FELSENTHAL,
Atty's.

(Endorsed:) Filed February 21, 1885. Wm. H. Bradley, clerk.

Motion for new trial.

(Mackin.)

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

THE UNITED STATES
vs.
JOSEPH C. MACKIN.

And now comes Joseph C. Mackin, one of the defendants herein, in his own proper person, as well as by David L. Turpie, his attorney, and moves the court to set aside the verdict herein against him and for a new trial, for that:

1. The verdict aforesaid is not supported by the evidence adduced at the trial of this cause.

2. The verdict is contrary to law.

3. There was no proof in the case showing, or tending to show, that this defendant committed any offense against the laws of the United States.

4. That the court erred in admitting testimony which afterward was ruled out, tending to show that this defendant refused to answer when called before the grand jury, impaneled and sworn for the aforesaid district, and questioned concerning the matters and things charged in the information in this, and were particularly as to the alleged receipt of certain spurious printed papers, purporting to be election tickets from one
Wright by this defendant on the 21st day of November, A. D. 1884.

50 5. That the court erred as to the law in the charge herein to the jury.

6. That the court erred in refusing to charge the jury as prayed by this defendant.

7. For other errors apparent upon the record, to the prejudice of this defendant, in the admission against his objections of irrelevant and improper testimony, and in the exclusion of testimony material to his defense, offered by this defendant; and

8. That this honorable court hath not jurisdiction to enter judgment upon the verdict herein against this defendant.

DAVID L. TURPIE,
Per T.,
Atty. for Joseph C. Mackin.

(Endorsed:) Filed February 21, 1885. Wm. H. Bradley, clerk.

On the same day, to wit on the twenty-first day of February, 1885, in the December term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, judge, are the following entries, to wit:

Order.

THE UNITED STATES OF AMERICA
vs.
JOSEPH C. MACKIN ET AL.
} Criminal information.

Now comes the district attorney, and comes also the defendant, Joseph C. Mackin, and Michael C. McDonald and John W. Crawford, his cognizors, and the defendant, Joseph C. Mackin, and Michael C. McDonald and John W. Crawford, jointly and severally acknowledge themselves to owe and be indebted to the United States of America in the sum of twenty thousand dollars, lawful money of the United States, to be levied upon their several and respective goods and chattels, lands, and tenements, rights, credits and effects, conditioned that the said Joseph C. Mackin personally be and appear before this court from day to day during the
51 present term, and from day to day and term to term thereafter, to answer to and abide by the sentence and judgment of the court

herein against him, and not depart without leave of the court; then this recognizance to be void, otherwise to be and remain in full force and effect.

Order.

THE UNITED STATES OF AMERICA
vs.
WILLIAM J. GALLAGHER ET AL.
} Criminal information.

Now comes the district attorney, and now come also the defendant, William J. Gallagher and Michael C. McDonald and Dennis Cavanaugh, his cognizors, and the defendant, William J. Gallagher, and Michael C. McDonald and Dennis Cavanaugh, jointly and severally acknowledge themselves to owe and be indebted to the United States of America in the sum of twenty thousand dollars, lawful money of the United States, to be levied upon their several and respective goods and chattels, lands and tenements, rights, credits, and effects, conditioned that the said William J. Gallagher personally be and appear before this court from day to day during the present term, and from day to day and term to term thereafter, to answer to and abide by the sentence and judgment of the court herein against him, and not depart without leave of the court; then this recognizance to be void, otherwise to be and remain in full force and effect

Afterwards, to wit, on the 12th day of March, in the adjourned March term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodget, judge, is the following entry, to wit:

Judgment.

THE UNITED STATES OF AMERICA
vs.
JOSEPH C. MACKIN AND WILLIAM J. GALLAGHER, indicted with Arthur Gleason.
} Criminal information under section 5440, R. S.

52 Now come the district attorney and the attorneys on the part of the prosecution, and now come also the defendants, Joseph C. Mackin and William J. Gallagher, in their own proper persons and by their respective attorneys, David Turpie and Henry W. Thomson, and now comes on to be heard the motions entered herein of said defendants Mackin and Gallagher for a new trial of this cause, and after hearing the arguments of the respective counsel, the court being now fully advised in the premises overruled said motions, to which ruling of the court the said defendants Mackin and Gallagher, by their attorneys, now here except, and said defendants Mackin and Gallagher now file their motion in arrest of judgment, and the court being now fully advised upon said motion in arrest, overrules the same, to which ruling of the court on the motion in arrest the said defendants now here except, and on motion of the district attorney for sentence and judgment against said defendants, now come said defendants Joseph C. Mackin and William J. Gallagher to the bar of the court, and the court orders that the defendants Joseph C. Mackin and William J. Gallagher be now taken into the custody of the marshal of the

United States for this district, and the sentence of the court is that within not to exceed ten days said marshal convey said defendants Mackin and Gallagher to the penitentiary of the State of Illinois, at Joliet in said district, and deliver them into the care and custody of the proper officer in charge of such penitentiary, and that said defendants, Mackin and Gallagher, be in said penitentiary imprisoned for the term of two years from the time they are so delivered to said officer, and that they pay a fine to the United States of five thousand dollars each, and that they stand committed until said fines are paid. It is thereupon considered and adjudged by the court that the said defendants Joseph C. Mackin and William J. Gallagher be within ten days removed to the penitentiary of the State of Illinois at Joliet, in the State of Illinois, and delivered to the proper officer in charge of said penitentiary, and that the said defendants Joseph C. Mackin and William J. Gallagher be imprisoned in said penitentiary for the term and period of two years; that they make their fines to the United States in the sum of five thousand dollars each; that they stand committed until said fines are paid, and it is ordered that execution issue for said fines.

53 The motion in arrest of judgment, filed by the said defendants, Joseph C. Mackin and William J. Gallagher, by their counsel, on the twelfth day of March, A. D. 1885, and referred to in the last preceding recited order herein, is in the words and figures following, to wit:

Motion in arrest of judgment.

UNITED STATES OF AMERICA,
Northern district of Ill., ss:

In the district court of the United States in and for said district.

THE UNITED STATES
vs.
WILLIAM J. GALLAGHER, Joseph C. Mackin, impleaded.
} Information No. 1033.

Now come the said defendants, William J. Gallagher, Joseph C. Mackin, respectively, and move the court to arrest judgment herein, for that:

I. The matters and things in the information herein, and in each and every count thereof, set forth and charged, do not constitute any offense against the laws of the United States.

II. The matters and things in the information herein, and in each and every count thereof, set forth and charged, do not constitute any offense whereof this honorable court hath jurisdiction.

III. The matters and things in the information herein, and in each and every count thereof, set forth and charged, are cognizable only in the proper courts of the State of Illinois, which, under the laws and Constitution of the United States, have exclusive jurisdiction thereof.

IV. There was no evidence in the cause tending to establish that either of the defendants was guilty of any offense against the United States.

V. The verdict of the jury against each of the defendants is not supported nor warranted by law; and for that,

54 VI. This honorable court hath not jurisdiction to enter judgment and sentence upon said verdict.

WILLIAM J. GALLAGHER,
By THOMSON AND FELSENTHAL,
His Attorneys.
JOSEPH C. MACKIN,
By D. TURPIE, *His Attorney.*
Per H. W. T.

(Endorsed:) Filed March 12, 1885. Wm. H. Bradley, clerk.

Afterwards, to wit, on the twenty-first day of March, in the adjourned March term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, judge, is the following entry, to wit:

Order.

THE UNITED STATES OF AMERICA *vs.* JOSEPH C. MACKIN AND WILLIAM J. GALLAGHER et al. } Criminal information.

Now come the defendants, Joseph C. Mackin and William J. Gallagher, by E. A. Storrs, esq., their attorney, and now comes also the district attorney, and on motion of said E. A. Storrs, it is ordered by the court that the time for the marshal of this district to remove the said defendants, Joseph C. Mackin and William J. Gallagher, to the penitentiary of the State of Illinois be extended to the twenty-fourth day of March instant.

On the hearing of said cause the following exceptions were taken and were allowed by the court and made of record, which said exceptions are in the words and figures following, to wit:

55 UNITED STATES OF AMERICA,
Northern district of Illinois, ss:

In the district court thereof.

UNITED STATES *vs.* JOSEPH C. MACKIN, WILLIAM J. GALLAGHER et al. } Information No. 1033.

Be it remembered that on the 6th day of February, A. D. 1885, this cause came on to be heard upon the issue joined before the Hon. Henry W. Blodgett, judge, and the jury empaneled herein, whereupon JOHN SCHEUSTER, Jr., was called as a witness on behalf of the United States, and, being duly sworn, testified as follows:

I was United States supervisor at the election held on the fourth of November last, at the second election district of the eighteenth ward of the city of Chicago, and fourth Congressional district of the State of Illinois; J. C. Sullivan was the other supervisor; Peter Hansborough, S. P. Shields, and Dr. Simon Strausser were the judges of election; Ed. Kelley and M. Sullivan were the clerks. These and Burchardt, one of the challengers, and myself were in the room where the election was held. I kept a registry of the votes; it agreed with that kept by the judges and clerks. At seven p. m. the polls were closed, and the votes were counted.

Witness identified record or report kept by him as supervisor, showing the number of votes received by each candidate, ascertained and written out at that time and counted. George E. Adams, candidate for Congress, had 494 votes; John P. Altgeld, the other candidate, had 268 votes.

Q. "Now look at the vote cast for State senator."

(Which question was then and there objected to by defendants; objection overruled by the court; to which ruling of the court the defendants then and there excepted.)

A. Henry W. Leman received 420 votes for State senator, and Rudolph Brand 274 votes.

56 Q. Did you compare the results as shown by this paper in your hand (the supervisor's list or report) with the result as shown by the tally-list and poll-book kept by the judges and clerks?

A. Yes, sir.

Q. What was your result of the comparison?

(Objected to by defendants; objection overruled by the court; to which ruling of the court the defendants then and there duly excepted.)

A. Yes, sir; it agreed with the tally kept by clerks and judges.

Ed. Kelley copied one tally-sheet and M. Sullivan the other. The judges and clerks signed these tally-sheets and poll-books at the close of the count in my presence and sight. The poll-book and tally-sheet were put in the one envelope, the ballots in another; both envelopes were sealed and put in the ballot-box.

Cross-examined:

Beer was brought in there twice during the day; a few glasses only. Sullivan, the clerk, started writing out one of the tally-sheets in the room where they had been voting. He asked Sullivan, the supervisor, to show him how to make out a tally-sheet, and he made a few erasures on some of the names that he wrote too low down.

Thereupon JAMES E. ADAMS was called as a witness on behalf of the United States, and, being duly sworn, testified as follows:

I was a deputy marshal at the second precinct of the Eighteenth ward at the election on the 4th of November last. With the exception of forty minutes for dinner and half an hour for supper, I was at the polling place from the time it opened until half-past two o'clock on the morning of the 5th of November. The poll closed at seven o'clock p. m. I then went inside with the clerks and judges; we all went up stairs to the second floor, where the ballots were dumped upon tables and sorted out—the straight ballots separated from the scratched; the straight tickets were counted first, then the scratched tickets. Ed. Kelley, the clerk, kept

57 the count on a piece of paper. I made a memorandum from that; my memorandum shows that Brand received 274 votes for State senator, and Leman received 420 votes.

(The memorandum of witness showing this was put in evidence.

Defendants objected to the introduction of so much of the testimony of the foregoing witness as related to the vote for State senator; which objection was overruled by the court; to which ruling of the court the defendants then and there excepted.)

Thereupon J. C. SULLIVAN was called as a witness for the United States, being duly sworn, testified as follows:

I was a supervisor at the election on the fourth of November last at the second election district of the Eighteenth ward, and identify the paper handed me as the supervisor's return of that election which I wrote. (Return was put in evidence.)

I helped to count the votes; the count was made by Scheuster, Strausser, Shields, Sullivan, the clerk, and myself. The supervisor's return shows the result as announced. The figures agree with those given by the witness Scheuster.

Thereupon the United States called as a witness EDWARD D. KELLEY, who, being duly sworn, testified as follows:

I was clerk of election on the fourth of last November, at the second election district of the Eighteenth ward. I wrote the names of the voters opposite the number of their ballots in the poll-book; the other poll-book was kept by the other clerk, Sullivan. The count was completed between four and five o'clock on the morning of the fifth of November. It was made in what we call the bar-room, off the main hall of Turner Hall; straight Republican tickets first, then straight Democratic tickets, then scratched Republican tickets, then scratched Democratic tickets were counted. As the total vote was called off, I put it down on a sheet of paper, opposite the name of the man who received the vote. The 58 total votes were footed up, so that we knew what each man had and the dashes were then put down on the talley-sheet and the full amounts extended. I filled out one set of tally-sheets; one for the State officers, and one for the Presidential electors. I suppose clerk Sullivan filled out the other tally-sheet. He wrote the names of the candidates on the tally-sheet that I filled out. I wrote my signature upon one set of the tally-sheets and poll-books. They were sealed up in the ballot-box and taken to the Chicago avenue police station. Shields, Hansborough, Sullivan, the supervisor, myself, and Sullivan, the clerk, saw the box deposited there in the police station, behind the desk. It was delivered to somebody in charge of the station. The tally-sheet I made out went into the envelope with the poll-book, which was completed, into the box. I did not make out any certificate on the poll-book.

Thereupon the United States called CEPHAS M. BURKHARDT as a witness, who was duly sworn, and testified as follows:

I was challenger for the Republican party at the election on the fourth of last November at the second precinct of the Eighteenth ward; was present when the votes were counted. Henry W. Leman received 420 votes for State senator, and Rudolph Brand, 274.

(Defendants objected to the introduction of this evidence as to State senator; objection overruled by the court, to which ruling of the court defendants then and there duly excepted.)

Thereupon the United States called Charles Larsen as a witness, who, being duly sworn, testified as follows:

I am desk sergeant at the Chicago avenue police station; went on duty as such on the morning of the fifth of last November at seven o'clock in the morning; at that time Sergeant Montgomery said to me: "There is a ballot-box from the Turner Hall precinct, left here this morning; I turn it over to you." Turner Hall precinct is the second precinct of the 18th
ward. The box was under the desk behind the railing; it was not
59 tampered with while there; was taken away at half past eleven a.
m. by Shields, one of the judges of election. I don't know what
was in the box.

Thereupon Robert G. Mountgomery was called as a witness by the United States, was duly sworn, and testified as follows:

I am desk sergeant at the Chicago avenue police station; was such on the fifth of last November; about half past four o'clock in the morning, of that day Hansborough and Shields left a ballot-box at the station; it was placed behind the station-keeper's desk. I was relieved at seven o'clock by Sergeant Lawson and told him it was there.

Court adjourned.

On Saturday, February 7, 1885, the court convened at ten o'clock, and the trial of this cause was resumed, the following proceedings being had:

Julius S. Grinnell, Christopher Mamer and George R. Rockfellow were respectively called as witnesses for the United States, and being duly sworn, were shown the box in which were sealed up the poll-books, tally-sheets, and ballots of the election of the fourth of November last, at the second election district of the Eighteenth ward of the city of Chicago, in the northern district of Illinois. Each of these witnesses testified that after the poll-books, tally-sheets, and ballots were before the grand jury of Cook County, Illinois, the same were, in their presence, sealed up in the box made of tin, produced in evidence. That the seals were intact; that after being sealed, the box was returned to Michael Ryan, county clerk of Cook County.

Michael Ryan was thereupon called as a witness for the United States, and, being duly sworn, testified as follows:

I am county clerk of Cook County, Illinois; this tin box is now
60 in the condition in which it was returned to me in my office after
having been before the grand jury of Cook County. I then put
it in a safe which I locked and of which I alone had the combination; the ballots were sealed up by the deputy United States clerk of this court in the presence of District Attorney Tuthill, Mr. Hempstead Washburne, and myself. I have the key here (producing a Yale-lock key).

By instruction of the district attorney, witness opened the box in the presence of court and jury. A package contained in a sealed envelope about 12x18 inches in size, witness identified as that in which the ballots had been sealed up. It was intact as when put in the box. Another similar envelope taken out of the box was identified by witness as that in which the poll-book and tally-sheets had been sealed up. It contained both poll-books, one of the books as originally found in the envelope containing the ballots.

JULIUS S. GRINNELL, CHRISTOPHER MAMER, and GEORGE R. ROCKFELLOW, were respectively recalled and testified, corroborating in all material particulars the testimony of the last witness, Ryan.

Mr. E. A. DRUMMOND, deputy clerk of the United States district court, was called as a witness for the United States, and, being duly sworn, testified as follows:

The package containing the ballots purporting to be those of the second precinct of the Eighteenth ward was brought here before the grand jury, opened on Tuesday, the 25th of last November, and again sealed up by me. I was sworn by the court to take special charge of them; kept them under my eye-sight all the time that they were here. I had to do only with the one package, that containing ballots and certain affidavits of voters and householders, and the poll-book. After I had sealed them I returned them to McGurren, deputy county clerk.

By order of court the opening of the packages was postponed, and the box and its contents were placed in charge of the clerk of the court.

61 Thereupon SAMUEL P. SHIELDS was called as a witness for the United States, and, being duly sworn, testified as follows:

At the election on the fourth of November last I was one of the judges at the second precinct of the Eighteenth ward. After the ballots were counted and the returns filled out they were placed in envelopes. One poll-book was placed with a tally-sheet in the envelope; the other poll-book was put in the box; whether in the envelope with the ballots I am not certain; I had the key to the box. At about half-past four o'clock on the morning of the fifth I delivered the ballot-box, sealed up, to the police sergeant at Chicago avenue station. Between eleven and twelve o'clock, or between twelve and one, of that day I went to the police station, got the box, took it to the county clerk's office, and delivered it to the man behind the desk.

Cross-examined:

Two men were behind the desk in the county clerk's office; I handed the key to one of them; he opened the box, took out the packages, and put the box to one side; I then went away.

CHESTER M. DAWES was called as a witness for the United States, and, being duly sworn, testified as follows:

I am assistant to the district attorney of this district. On the twenty-first of November a subpœna was issued to County Clerk Ryan to produce the ballots, tally-list, poll-books, and so on in this case. It was issued

on the morning of that day. [The subpœna was produced and identified by witness.] About two o'clock the same day County Clerk Ryan responded to the subpœna. He did not produce the ballots or other documents. This was on Friday; Saturday morning the matter was brought before this court, and his honor Judge Blodgett entered a rule on Ryan to show cause why he should not be attached for contempt in not producing the poll-book, ballots, etc., in response to the subpœna. The rule was made returnable the following Monday at ten o'clock. At that
62 time an order was made that the ballots and returns should be produced forthwith, but an arrangement was made by which forthwith was agreed to be two o'clock that afternoon. He then produced the poll-books and tally-lists and they were examined before the grand jury. Tuesday the ballots were produced in the grand-jury room. One poll-book and the tally-lists was produced Monday; they were in the same envelope; the ballots were also in an envelope, which contained when produced one of the poll-books. The poll-book in the envelope that Ryan brought on Monday had an erasure on it.

Q. In what respect?

A. An erasure in respect to the number of votes cast for State senator. It was a manifest erasure on the face of the poll-book in the certificate of the vote for State senator. It was written out. The vote on that poll-book appears for Rudolph Brand—

(Counsel for defendant objected to the answer of witness, and moved that it be striken out; which objection was overruled by the court, to which ruling of the court the defendants then and there excepted.)

The witness continuing, answered as follows:

There was a manifest erasure of the vote on it, and over the erasure it read Rudolph Brand, 474, Henry W. Leman 220. The other poll-book contained the same figures for Brand and Leman, but there did not appear to have been any erasure in the second book at that point; I called it the second poll-book because it came in the envelope with the ballots and was examined second. The ballots were strung; the string was cut, and two hundred and seven or eight ballots first taken from the string were found to be straight Republican, with the exception that in the place of the name of Henry W. Leman for State senator, the name of Rudolph Brand was printed. These ballots were all clean looking; they were folded the greater part of them, in the same creases; a large number of them were so folded that the number on the ballot was folded on the inside. The ballots were restrung, as they were examined, in the same order in which they had been before being taken off the string; they were then resealed by Mr. Drummond, the clerk of this court. From the poll-book showing the number of each voter's ballot as cast and the number on each
63 ballot, we made out a list showing how, according to the ballots produced before the grand jury and the poll-books, each voter voted. On Monday, when the rule upon Ryan to show cause was before the court, I saw Mackin, the defendant, in the court and about the hallway opposite the door. I think I saw him about here the Friday or Saturday preceding.

Later in the day Mr. Dawes took the stand and stated that he did not intend to be understood to say distinctly that he saw Mackin about the court on Friday or Saturday. He did not recollect how it was. He was confident that he did see Mackin here on Monday, the 24th.

Augustus L. Chetlain was called as a witness for the United States, and being duly sworn, testified as follows:

On the fourth of November last I was a resident and voter of the second precinct of the eighteenth ward. I voted at that precinct. I examined my ticket particularly, especially to see whether the name of Henry W. Leman, who was a friend of mine, was on my ticket. I did this because I had understood that a ticket was being got up without his name on it. Leman was candidate for State senator. I saw that his name was on my ticket. I folded it up and handed it to one of the judges. If any ticket purporting to be that which I voted at that precinct on that day has on it the name of Rudolph Brand for State senator instead of the name of Henry W. Leman, it is not the ticket I voted, and it was never voted by me.

Court adjourned.

Michael W. Ryan was thereupon recalled as a witness by the United States, and being duly sworn, testified as follows:

Defendant Arthur Gleason was, during the month of November last, my chief clerk; defendant Henry Biehl was assistant chief clerk. I had in all about sixteen deputies at that time. The vault of the office is probably 10 x 16 feet. In it are kept the files and records. The books of
64 the office, after the day's business, are also kept there. On the night
of the twenty-first of November last John Shields and John O. Loughlin and defendants Gleason and Biehl had the combination of the locks of that vault; nobody else had it that I know of; I did not have it. The same four persons had the combination on the 22d and 23d. On Monday, the 24th of November last, at the suggestion of the grand jury, I had the combination changed, kept it until the other day, when I went out of the city; I then gave it to the cashier. I don't know who received the ballots in question; I had to entrust that to my deputies. From the defendants Gleason and Biehl I learned that those ballots were received on the afternoon of the fifth of November. Defendant Gleason told me when the question where these ballots were kept was first raised that they were kept in one of the two large boxes under the table in the vault, locked with a Yale lock, of which Gleason and myself had the key.

I did not know that I had a key to that box until District Attorney Tuthill and members of the grand jury came to my office, when the cashier's private drawer was opened, and locked in the drawer of the safe in that vault, the key to these large chests was pointed out to me. Gleason and myself were both present when the grand jury visited the office to examine for themselves. These were large wooden boxes that had been used for the purpose of keeping the election returns of Cook County in them. Owing to the increase in the number of precincts at the last election another box had to be provided It was made of pine boards nailed together, and had no lock. The cover was nailed down. After defendant Gleason had been before the grand jury I asked him where those ballots were; he then told me they had not been in either of the boxes that were locked, but had been placed in the new box; he took me into the vault and showed me the tin box where the ballots were; he told me there was rumor around the street that somebody was going to seize the ballots and returns in question by force, and that he and Biehl and some of the other boys then searched for the ballots, found them in the box on which the cover was nailed, instead of locked, and placed them in tin drawer "244"; that drawer is about 12x15 inches; it is one of a large number of drawers in the 65 vault. Gleason told me afterward that he had made a mistake, and was going back to the grand jury to correct it; that he swore those returns were in the box with the Yale lock when they were in the tin box. Justices Scully, Kersten, and myself, were the canvassing board, and commenced the canvass in the county commissioner's room over my office on the 11th of last November. My recollection is that on the 20th we reached the second precinct of the 18th ward; we had before us the poll-books and tally sheets; there was an erasure in the writing of the votes for Leman and Brand, the candidates for State senator in the sixth senatorial district. About two letters appeared to have been erased in each word. Over the erasures were written the words "four" and "two." When the erasures were discovered the attention of Leman's friends were called to it, and an argument was made before the board as to whether they could hear evidence, as to whether this was a true return or not. Hansborough and Shields, judges of that precinct, were present; I announced that if they wanted to speak in reference to that matter the board would hear them. McKeogh, an attorney, who claimed to represent Hansborough, objected to their saying anything, and they said nothing. After the argument, defendant Gleason and myself brought down the returns, sealed them up, and Gleason put them away in one of the boxes.

Cross-examined:

Usual business hours that vault is open; and many persons in the office, deputies and employees, lawyers, and clerks of the court, and employees of the county treasurer's office and of the recorder's office have access, upon proper occasion, to the vault, so had the people connected with the private abstract firms. On the morning of the fifth, two watchman were set to watch the vault; at six in the evening they were relieved by two others; the watch was kept up until the evening of the 21st. I understood they were sent there by the Republican party; it has been customary to have such watch kept over the returns; besides, I, myself, had a special watchman there at nights, and a man retained from our day forces for the purpose of watching during the day; it may have 66 been the 18th of November, instead of the 20th, that the erasure was first noticed by the canvassing board.

Agreed by all counsel in the case that the 18th of November was the correct date.

MONDAY, *February 9th*, A. D. 1885.

The court met pursuant to adjournment, and the trial of this cause was resumed.

Thereupon JOHN B. JEFFERY was called as a witness on behalf of the United States, and being duly sworn, testified as follows:

Am president of the John B. Jeffery Job Printing Company. Our company printed the regular Republican ticket voted at the last election. I had four separate and distinct headings made for the ticket so as to prevent its being counterfeited. I selected type which was not in general use, and bought up all of that kind that could be found in the market. Selected different styles of type for the heading, the caption, and the offices. The tickets were made in sections. I made the combinations and headings so that no one knew what it would be until it was finished. Commenced printing the tickets about nine o'clock the night of November 3. The only persons who knew about the ticket were Mr. Catlin, my foreman, Mr. Griffings, and myself. No one who had seen the tickets was allowed to leave the room. The tickets were printed and ready about three o'clock on the morning of the fourth of November. There was no opportunity for a copy of the ticket to get out until the tickets were regularly delivered to the Republican committeemen.

(Copies of the genuine Republican ticket printed by witness identified by him and put in evidence.)

Cross-examined:

Any one who had the engravers all ready and had the type such as we used in that ticket, and had the workmen at hand and the requi-
67 site facilities, and a good impression of the ticket, I presume could have made a copy of it in about five hours. That is about as short a time as it could be done in.

Henry McGurren was thereupon called as a witness for the United States, was duly sworn, and testified:

That in November last he was a deputy in the county clerk's office; as such in the month of November, together with the defendant Gleason, I took the ballots in question before the United States grand jury room, saw the ballots opened, watched them while there, saw them sealed up again and the seal of the court placed on them; then took them back to the county clerk's office, where they were locked up in the vault. Brought them back a second time at the request of the grand jury; the seals placed upon them were intact, saw them opened a second time before the grand jury. Watched them there; saw them resealed with the seal of this court; took them back to the clerk's office, where they were placed in the vault. What I have said as to the ballots applies also as to the poll-lists and tally-sheets, which were also taken before the Federal grand jury.

Charles R. Larrabee was thereupon called as a witness for the United States, was duly sworn, and testified as follows:

I was a voter in the second precinct of the 18th ward on the 4th day of November last; had charge of the distribution of the Republican ballots at that precinct; did not see or hear of any ticket having a general appearance to the regular Republican ticket upon which the name of Rudolph Brand was printed in the place of that of Henry W. Leman for State senator. I was on the lookout to see what tickets were distributed there.

Jerry S. Thompson was thereupon called as a witness for the United States, was duly sworn, and testified as follows:

Am a printer; in last November was engaged at P. L. Hans-
68 com & Company's, 104 and 106 Madison street. I got a heading for a ticket engraved for the firm. The copy for the engraving I

got from Mr. S. B. Wright. I think the errand boy was there at the time. Possibly the book-keeper. The defendant Mackin was there. He was talking to S. B. Wright. He was not there but a moment while I was there. I came in and, I think, he went out immediately; I don't know. I think while Mackin was there Wright asked me if I could get a copy of that engraving. Told him I thought I could. Wright told me to get it done. This was about two o'clock; I cannot fix tne date.

I went to Baker & Company—Fallis is the proprietor of the place—to get the ticket engraved. I kept quiet about it. I understood that was part of the business. I found Fallis, and impressed upon him the necessity of hurrying about it, and he brought it to me about six in the evening. I gave it to S. B. Wright. Witness identified the ticket shown him as an impression from that engraving. P. L. Hanscom & Company had printed a great many tickets on Mackin's order.

Cross-examined:

Hardly think Mackin heard the conversation between Wright and myself. Think that Wright came across the room and gave me those directions; I don't think he gave them in the hearing of any one.

W. J. SWEENIE was thereupon called as a witness for the United States, was duly sworn, and testified:

Have been a deputy county clerk since a year ago last December. On the 21st of November last, about three o'clock in the afternoon, O'Hare, another deputy, and myself, were sent into the vault—my impression is by the defendant Gleason—to look up the ballots of the second precinct of the Eighteenth ward. While we were looking at one box the defendant Biehl was looking at another. Biehl found the ballots in the pine box with the top nailed down, and put them into the tin box on the other side of the vault.

69 SAMUEL B. WRIGHT was thereupon called as a witness for the United States, was duly sworn and testified:

I am in the printing business with the P. L. Hanscom Printing Company. Know the defendant Mackin. We have done about $4,300 worth of political printing for him. Friday afternoon, November 21st, about two or half past two o'clock, Mackin came to our office with a Republican ticket and asked if we could have a duplicate of it made for him in a few hours. I said we could. He asked if I would attend to the engraving; I said I would; he said he wished it kept rather close and wanted the ticket just as fast as we could get it. I cut off the heading of the ticket. Mr. Jerry S. Thompson came into the room while Mackin was there and asked him to go and have it engraved as quick as he could.

(Witness was handed one of the genuine Republican tickets, already in evidence, and identified it as a fac simile of that which Mackin handed him to be copied.)

He proceeded to testify as follows:

On the ticket handed to me by Mackin the name of Leman was crossed off and that of Rudolph Brand was written in ink underneath the name of Leman. Mackin said the ticket was to be printed as he handed it to me. I gave my brother, William H., that portion of the ticket under the

heading; told him to set it up as soon as possible. We sent out to get type like that on the ticket to be copied; we had not all the styles on the ticket; we could not get all the same types; we got some almost the same and used it instead. My brother, William H., set up the ticket. About six o'clock we got the engraved heading; it was brought either by Beers, the press boy, or by Jerry S. Thompson. The type were up, the form was locked in the chase and put in the press and printed; Henry W. Beers printed it; he is a pressman in our employ. The work was finished about nine o'clock; 2,000 were printed; I wrapped them up, went with my brother, William H., to the Palmer House, and delivered them to the defendant, Mackin, at his room there. The night before I testified before the Federal grand jury. I went over to Mike McDonald's saloon to see Mackin. Told him I was going to testify before the Federal grand jury. He said those proceedings were all buncombe to frighten
70 Democrats, and would soon blow over, and he was not afraid of them.

Some reporters called to interview him. He excused himself a few moments, came back, and said he did not want to be seen talking to me, and that we had better take a walk, which we did, going to the corner of Fifth avenue. He asked me if I knew where my brother was. I told him I did not. He said it would be a favor to him if he would keep out of the way for a few days.

The box containing the ballots from the county clerk's office, as those returned from the second precinct of the Eighteenth ward, were brought into court and opened. A large envelope taken out of it was opened. From that the ballots were taken and put in evidence. Witness identified one of the ballots as similar to those printed by him and delivered to Mackin. It differed from the regular Republican ticket shown witness, which was one produced by the witness Jeffery, and by him sworn to be a genuine Republican ticket. The Republican ticket had a different type for the names of the offices for which candidates were voted. My brother could not get the type to make an exact fac simile in this respect of the regular Republican ticket of which Mackin gave us the copy. The type we used was similar to that on the Republican ticket, but there was a slight difference in the names of the offices. The ticket shown me also has the name of Rudolph Brand on it instead of Henry W. Leman for State senator.

Cross-examined:

The ballot from among those put in evidence as having been voted at the second precinct of the Eighteenth ward, numbered in pencil on the back "10," was shown witness, and he continued as follows:

This is one of the tickets, or similar to one of tickets, that we printed as I have stated on the 21st of last November. Besides the number on the back there is written in pencil a name—John Wynner, or Wyne, or Wyner.

Q. Is it not W-y-n-n-e?

A. I think it is.

The political printing done by us for Mackin, generally done
71 through Mr. Thompson, had all been paid for with the exception of three hundred dollars balance due from the last campaign; the last work done for Mackin was some circulars, entered on the book the 28th of November. The circular called a meeting—Cook County Democratic

Committee, or something of that sort. Don't know whether it was ordered on that day or not. Sometimes we don't enter a job for a week after it is ordered. No account has been rendered to the defendant Mackin for the two thousand tickets about which I testified.

I went before the United States grand jury Tuesday, the 2d of December last; I came here and signified my intention of going before the grand jury; the subpœna was then read to me; for four days prior to that time I stopped with Frederick Norman, a friend, at 44 Laflin street; I had been living before that where I live now, with my mother and younger brother, at 54 Arbor Place; during the four days I was at Laflin street; I did not spend any time whatever at our place of business.

Re-examined:

I was absent from home because I did not desire newspaper notoriety; another reason was that I did not want to receive the odium that usually comes to an informer, and I felt sorry for Mackin that he had got into trouble, and I did not want to be the one to get him into trouble; the newspapers had been full of the matter of the investigation into this alleged fraud for some time prior to the four days.

William H. Wright was thereupon called as a witness on behalf of the United States, and was duly sworn, and testified as follows:

Am a printer; in November last was employed by the P. L. Hanscomb Printing Company; on the twenty-first of last November I was called down from the printing office by my brother; he showed me a Republican ticket; wanted to know if we could do it that evening by ten o'clock; I said we could, if we had the requisite type; the engraved head was cut off the ticket at the time; I went up stairs with the ticket and went to work at it; my brother ordered some type which we did
72 not have; Mackin was in the office when I was called down. I had the ticket set up ready at six o'clock in the evening. The engraved head came from the engravers about seven o'clock. I got the form ready and sent it to press. It was printed by Henry Beers, one of our press feeders. After it was printed my brother and I took it to the Palmer House to Mackin. My brother told me to keep it private. I did so. On the ticket we printed the names of the offices were in type different from the copy that my brother gave me. We couldn't get exactly similar type. There is another difference in the copy I set up. I put a period after the letter "J" in the name of "J. Otis Humphrey," in the list of electors. That period is not in the regular Republican ticket. (Witness identified the ticket number ten, as like those he printed.) District attorney handed witness a tympan proof of a ticket and offered it in evidence, it being similar in general appearance to the tickets identified as those printed by the Wrights on November 21, 1885, which he showed the witness and called attention to the letter "v" in the word "votes" in the phrase "for representative in the State legislature"; witness continuing, said: After the form went to press I took that tympan proof sheet and found the "v's" in the words "votes" were lower-case or small "v's" instead of capital "v's," and I had the correction made. The change was made in the word "votes" twice, the word being printed twice on the ticket, once immediately under the other. The tympan proof in evidence had "lower-case" or small "v's" in the word "votes," while in the other tickets,

printed by the Wrights, capital "v's" were used. When my brother enjoined me to secrecy our bookkeeper overheard what was said. Mackin was there; I think he heard it. We took the tickets to the Palmer House and delivered them to Mackin; myself, my brother and Mackin were there when they were delivered, and no other person. Saw him again about two weeks after. I saw there was going to be difficulty in the matter; saw that in the papers. Went to the Palmer House to see Mackin. Did not see him. Came away and met him in the street near McVicker's theatre. Told him I would like to speak to him and we went to our printing office. Mackin made light of the matter. The next day was 73 Sunday; I had been bothered by reporters. They came to see me pretty often Saturday and Sunday. Some of my friends talked the matter over with my wife and others with me, and I concluded that perhaps I had better go away for a few days. I saw Mackin that Sunday afternoon in his room. He put it as if I was the one in trouble. I did not think I was. My efforts to keep everything secret were not on my account at all. I told him so. However, nothing came of that interview. That evening I concluded to go away for a little while to get rid of reporters and escape testifying before the grand jury. So I went to Oak Park, eight or ten miles from the city. I came back on Wednesday afternoon. I gave the engraved head of the ticket to Mackin that night at our office. He put it in his pocket. I appeared voluntarily before the grand jury. Came in and told District Attorney Tuthill, that I was going to appear before the grand jury the next day. Thursday night while I was at Oak Park, Melville E. Stone and United States Marshal Jones came out to see me. I talked to Stone half an hour, perhaps an hour. He wanted me to give him information—all I knew about the printing of the tickets. He would not tell me the source of his information, and I said that I could not answer under the circumstances. Before the United *United* States grand jury a fac simile of the ticket printed by us was shown me. The first time the ticket was shown to me I identified it as my work.

Q. Do you recollect of the ticket's being handed to you and of its being handed to you again by District Attorney Tuthill, and of your looking at it a second time, and on the second examination of your attention being called to differences as claimed between it and the regular ticket, and of your saying that this was your work?

A. I may have looked at it twice, the same as I would look twice at anything before I would speak.

Re-examination:

I burned the copy Mackin gave me that night; he and I were in the office; I showed the copy to him or gave it to him; he handed it back and I burned it in his presence in the gas.

Court adjourned.

74 Thursday morning, February 10, 1885, court met pursuant to adjournment, parties and jury being present, and S. W. **Fallis** was called as a witness for the United States, and, being duly sworn, testified as follows:

I am a wood engraver; do business under the name of Baker & Company. On Friday, the 21st of November last, about a quarter past or half past two o'clock, Jerry S. Thompson brought in an impression of the Republican ticket heading that was used at the election on the 4th of November last, and wished to have it engraved or duplicated; he wanted it done by three o'clock. Told him that would be impossible. He left it to be done in as short a time as possible. We talked generally on other topics about wagers, etc., and he said if we could have it done by a certain time he would win.

Q. He would win his wager?

A. He would win. I would not say he used the word "wager," but that he would win. It was simply a casual remark that had nothing to do with it. He said I should not make it public. That is a common thing about jobs generally, and I asked no questions about it. I transferred the heading he brought, by means of acids, to a block. I placed that in the hands of my foreman, Mr. Tucker. He engraved it; had the job nearly finished about ten minutes to six; brought it to me, and I finished it and delivered it to Jerry S. Thompson. It was engraved on boxwood. The ballots in evidence from the second precinct of the Eighteenth ward were produced, and the witness identified ballots numbered in pencil on the back "201," "177," "427," "537," as not having been printed from the engraving made by him as testified. The witness then identified ballots number in like manner, 429, 100, 533, 14, and 161, being some of the ballots identified by S. B. and W. H. Wright, and having the name of Rudolph Brand thereon as candidate for State senator, as having been printed from the engraving which he made, as testified. He pointed out to the jury three defects or differences in the ticket engraved by him, being three particulars in which the engraving made by him was not an exact copy of the genuine Republican ticket heading in question. These defects he pointed out to the jury as follows: Under the letter "p" in
75 the word "Republican" in the caption there was a "break" in the
fancy web-work line in the ticket witness engraved, caused by the slipping of a tool in the engraving. In the genuine Republican ticket, as the jury could see, that particular line was distinct and unbroken. In the cut on engraved head of the Republican ticket were a small pair of scales; the lines in the genuine Republican ticket, as witness showed jury, were continuous and unbroken. In the engraving made by witness, as testified, by a slip of the tool this line was cut through so that it was plainly visible to the naked eye upon close observation. In another place on the engraved heading there was a cut also made by the slipping of a tool through the letter "R" that was in the engraved head made by witness. It was not to be found in the regular Republican ticket heading.

Witness also pointed out a broken line in the fancy net-work engraving under the letter "p" in the word "Republican" in the engraved heading made by him, as testified. In the genuine Republican ticket that break was not apparent. Witness identified tickets numbered 161, 14, 246, 533, 100, and 429 by these peculiarities in the heading as having been printed from the engraved head made by him as stated. On these tickets were the names of all the Republican candidates voted for at that election except that of Henry W. Leman for State senator; instead the name was printed "Rudolph Brand." Witness pointed out this difference also to the jury on the numbered ballots in question. Witness identified ballot number

10, having thereon in pencil the name of John Wyne or Wynne, as having been printed from the engraving made by him.

On cross-examination witness said, my attention was not directed to these differences in the tickets until I was examined before the United States grand jury. Witness was shown some of the regular Republican tickets put in evidence, and which John B. Jeffery, a witness for the United States, testified were impressions from the engraved head and type form used in printing the regular Republican ticket for the election on the fourth of November last. On some of them he pointed out breaks in the fancy web-work line, but in other impressions from the same head
76 and type form it appeared those lines were unbroken. Witness explained this might have occurred from the wearing down of the electrotype plates or from accidental bad impressions in the press-work. The broken lines last above mentioned, which witness pointed out, were not the same as those which he had indicated in his comparison of the genuine Republican ticket with that from which he engraved the head. Witness identified said tickets, and selected them from the mass of tickets in evidence by merely examining the engraved heading, not looking at the printed matter on the tickets.

FRED. N. TUCKER was thereupon called as a witness for the United States, and testified as follows:

I am a wood engraver; work for Baker & Co. About half past two on Friday, November 21st, Fallis, the last witness on the stand, brought to me an impression of the heading of the regular Republican ticket. It was on a block; I did the engraving. The witness was asked to look among the ballots in evidence (returns from the second precinct of the Eighteenth ward), and see whether he could identify any of them as printed from the engraved heading in question made by him. He selected tickets numbered 196, 379, 563, 531, 359, and 645. He identified them by the same defects or breaks in lines testified to by Fallis, and pointed out to the jury those breaks in the lines on the tickets by him identified as aforesaid.

Cross-examined:

Before the United States grand jury I hesitated about fifteen seconds before identifying the first of the tickets printed from my engraving. The first ticket shown me was not a good impression, and I did not recognize it as my own. I said I did not think it was printed from my engraving. On the second ticket shown me there everything was clear and printed up in good shape, and I recognized it immediately.

77 JOHN WYNNE was thereupon duly sworn as a witness in behalf of the United States, and testified as follows:

I live in the Eighteenth ward. Voted at the second precinct of that ward on the fourth of November last; the number of my ballot was ten. I was in the room here a few minutes since, and at the request of Mr. Turner, counsel for the defendant Biehl, looked at the ballot number ten, now shown me. It is not the ballot I voted; that is not my signature. It is not in the place where I put it.

Q. Do you pronounce that signature a forgery?

A. All I say about it is, it is not mine. Neither was it put there by my direction. My son and I compared my ticket before I voted with that published in the Tribune, name for name; my son made the comparison, and I took his word for it at the time. I think the name of Henry W. Leman was on the ticket I voted as a candidate for State senator. I wrote the word "against" opposite the printed line "appropriation for the county, etc.," on the ticket I voted. That word is not on this ticket. I came here this morning at the request of Mr. Turner; never saw him until last evening, when he came to my house with the defendant Mackin. I never saw Mackin before. At their request I came here this morning.

Q. What did they say to you when they called at your house last evening?

(Objected to by the counsel for the United States; objection sustained.)

J. EDWARD WYNNE was then called as a witness on behalf of the United States, was duly sworn, and testified as follows:

I am son of the witness who just left the stand. On the 4th of November last my father and I went to the polls together—second precinct of the Eighteenth ward. I voted ticket number "11" immediately after my father; I remember the number distinctly. [The ballot numbered eleven, being one of those in evidence from the second precinct of the Eighteenth ward, was identified by the witness as the ballot he voted. It bore the name of Henry W. Leman for State senator. The witness continued]:
78 I compared the ticket voted by myself and that voted by my father with the ticket that I cut out of the editorial column of the Tribune that morning; they were alike as far as I could see.

That is my signature in pencil on the back of ballot number eleven.

Cross-examined:

It might be possible that I would skip a name in making that comparison of tickets, but I don't think it would be at all likely.

H. W. BEERS was thereupon duly sworn as a witness for the United States, and testified as follows:

I was a pressman at the P. L. Hanscom Printing Company on the 21st of November last. About twenty minutes before six that afternoon S. B. Wright told me to come back after supper to do some work. I came back, and in the office down stairs met Jerry S. Thompson. He sent me with a note to Baker & Co., and told me to inquire for Mr. Fallis. I went. Soon after Fallis came in and delivered something to Thompson. He went upstairs with it. He came back and told me the work was ready for me. I went up, and W. H. Wright gave me a form. I put it on the press and worked off between fifteen hundred and two thousand impressions. Got through about nine o'clock. Several proof impressions were taken. Mr. Wright destroyed, or thought he destroyed, part of them. I put this one away [identifying the tympan-proof impression shown him and put in evidence]. I showed it to M. E. Stone, editor of the News. There was a change made after this proof was taken. A capital letter "V" was substituted for a lower case "v" in the word votes. I put this proof away where we put waste paper, where I knew I could find it. I afterward delivered it to Lush, the agent of Mr. Stone, of the News; he

paid me $25 for it. Mr. Wright found out through the newspaper what
I done. He asked me if I had sold it. I said "yes." He said he
79 would hold me and Stone responsible for it. That is all the conversation we had about it.

The fac-simile of this ticket was afterwards published in the News.

C. K. Lush was then sworn as a witness for the United States, and testified corroborating the witness Beers as to the purchase for $25 of the proof.

Albinus H. Wright was thereupon duly sworn as a witness for the United States, and testified:

Am one of the bailiffs of this court. Was at the county commissioner's room when what I supposed to be the subpœna to produce the tally-sheets and poll-books in this case was served upon County Clerk Ryan. There were quite a good many people there—a good many people present. The defendants Mackin and Gallagher were there. They left the room soon after or about that time. My opinion is that Gallagher went first and Mackin followed.

Nelson A. Cool was then sworn as a witness for the United States, and testified as follows:

I was secretary of the United States grand jury—the last grand jury. I was present when the ballots of the second precinct of the Eighteenth ward were opened. The first ballots that were taken from the string were new, clean, had the appearance of fresh, clean ballots. They could have been separated by that fact, I think, from the others without any trouble. According to my account, there were two hundred and nine such ballots; on each of them the name of Rudolph Brand was printed for State senator and the ticket was headed the regular Republican ticket; they were all folded in the same manner. One fold came near the name of Richard J. Oglesby. The other came between the names of Boutell and Sittig. When these tickets were folded, as they had been apparently at first, the majority
of the numbers came on the inside of the ballots. A clerk was
80 sworn in as clerk of the grand jury, and myself and Mr. Gary,
another member of the grand jury, by referring to the poll-book from the number on the back of the ticket, got the name of the voter and the ticket with his name on it, and made out a list for the whole two hundred and nine names, showing who had voted each ticket and how from these ballots he had voted for Congressman and State senator.

The envelope taken from one of the tin boxes, said to contain the poll-book of the second precinct of the 18th ward was opened. The poll-book taken therefrom was shown to witness and identified by him as that exhibited before the grand jury. He identified it by the erasures and the word "two" opposite the name of Henry W. Leman, and the word "four" opposite the name of "Rudolph Brand," candidates respectively for State senator; he also identified the tally-sheets which were in the same envelope, and a second poll-book which was found by the grand jury in the envelope with the ballots, all of which documents were put in evidence.

That portion of the poll-book in which the erasures testified to were made consists of the certificate required by the law of the State of Illinois, of the number of votes received by each candidate voted for at the said election. The points where the erasures appear are opposite the names of Henry W. Leman and Rudolph Brand, respective candidates for State senator in the Sixth senatorial district of the State of Illinois. The erasures are under the word "two" followed by the word "hundred" opposite the name of "Henry W. Leman" and under the word "four" followed by the word "hundred" opposite the name of "Rudolph Brand."

Following is a copy of said certificate:

81 And thereupon the United States introduced in evidence the poll-book found among the returns of the second precinct of the 18th ward aforesaid, and known and designated throughout the trial as poll-book No. 1, the certificate attached to which is as follows:

N. A. Cool, No. 1.

NOTE.—The number of votes received must be expressed in words at full length.

STATE OF ILLINOIS,
Cook County, City of Chicago, ss:

At an election held on the fourth day of November, A. D. 1884, in the 2d precinct of the 18th ward, in the city of Chicago, in the county of Cook, and State of Illinois, the following named persons received the number of votes annexed to their respective names for the following described offices, to wit:

Richard J. Oglesby had four hundred eight votes for governor.

Carter H. Harrison had four hundred eighty-seven votes for governor.

.... had .... votes for governor.

.... had .... votes for governor.

John C. Smith had four hundred twenty votes for lieutenant-governor.

Henry Sexton had two hundred sixty-eight votes for lieutenant-governor.

.... had .... votes for lieutenant-governor.

.... had .... votes for lieutenant-governor.

Henry D. Dement had four hundred twenty-four votes for secretary of state.

Michael Dougherty had two hundred sixty-eight votes for secretary of state.

.... had .... votes for secretary of state.

.... had .... votes for secretary of state.

Charles Swigert had four hundred twenty-one votes for auditor of public accounts.

Walter E. Carlin had two hundred seventy-two votes for auditor of public accounts.

82 .... had .... votes for auditor of public accounts.

.... had .... votes for auditor of public accounts.

George Hunt had four hundred twenty-four votes for attorney-general.

Robert McKinlay had two hundred sixty-nine votes for attorney-general.

.... had .... votes for attorney-general.

.... had .... votes for attorney-general.

Jacob Gross had four hundred thirty-one votes for State treasurer.

Alfred Orendorf had two hundred sixty-eight votes for State treasurer.

.... had .... votes for State treasurer.

.... had .... votes for State treasurer.

Geo. E. Adams had four hundred twenty-five votes for member of Congress from Fourth Congressional district.

John P. Altgelt had two hundred sixty-eight votes for member of Congress from Fourth Congressional district.

.... had .... votes for member of Congress from .... Congressional district.

.... had .... votes for member of Congress from .... Congressional district.

Christian Busse had four hundred seventeen votes for member of the State board of equalization from Fourth Congressional district.

John McKeough had two hundred seventy-one votes for member of the State board of equalization from Fourth Congressional district.

.... had .... votes for member of the State board of equalization from .... Congressional district.

.... had .... votes for member of the State board of equalization from .... Congressional district.

Alfred H. Taylor had four hundred twenty-one votes for clerk of the supreme court, northern grand division.

Michael J. Carroll had two hundred twenty votes for clerk of the supreme court, northern grand division.

.... had .... votes for clerk of the supreme court, northern grand division.

83 .... had .... votes for clerk of the supreme court, northern grand division.

Henry W. Leman had two hundred twenty votes for State senator from Fourth senatorial district.

Rudolph Brand had four hundred seventy-four votes for State senator from Fourth senatorial district.

.... had .... votes for State senator from .... senatorial district.

.... had .... votes for State senator from .... senatorial district.

Henry L. Boutelle had six hundred twelve votes for member of the house of representatives from Fourth senatorial district.

Eugene A. Sittig had six ninety-eight and half votes for member of the house of representatives from Fourth senatorial district.

Cornelius McAuliffe had three hundred ninety-seven half votes for member of the house of representatives from Fourth senatorial district.

Stephen F. Sullivan had four hundred and five votes for member of the house of representatives from Fourth senatorial district.

.... had .... votes for member of the house of representatives from .... senatorial district.

.... had .... votes for member of the house of representatives from .... senatorial district.

.... had .... votes for member of the house of representatives from .... senatorial district.

.... had .... votes for member of the house of representatives from .... senatorial district.

.... had .... votes for member of the house of representatives from .... senatorial district.

.... had .... votes for member of the house of representatives from .... senatorial district.

.... had .... votes for member of the house of representatives from .... senatorial district.

84 .... had .... votes for member of the house of representatives from .... senatorial district.

John J. Healey had four hundred thirty-eight votes for clerk of the appellate court of the first district.

William Curren had two hundred fifty-three votes for clerk of the appellate court of the first district.

.... had .... votes for clerk of the appellate court of the first district.

.... had .... votes for clerk of the appellate court of the first district.

Patrick McGrath had four hundred sixteen votes for clerk of the superior court.

Henry F. Donovan had two hundred sixty-three votes for clerk of the superior court.

.... had .... votes for clerk of the superior court.

.... had .... votes for clerk of the superior court.

Henry Best had four hundred thirteen votes for clerk of the circuit court.

Emil Hoechster had two hundred seventy-five votes for clerk of the circuit court.

.... had .... votes for clerk of the circuit court.

.... had .... votes for clerk of the circuit court.

Luther Laflin Mills had three hundred thirty-three votes for State's attorney.

Julius S. Grinnell had three hundred forty-one votes for State's attorney.

.... had .... votes for State's attorney.

.... had .... votes for State's attorney.

Wiley S. Scribner had four hundred thirty-five votes for recorder of deeds.

Joseph Donnersburger had two hundred sixty-eight votes for recorder of deeds.

.... had .... votes for recorder of deeds.

.... had .... votes for recorder of deeds.

85 Henry H. Hertz had four hundred twenty-one votes for coroner.

Noel B. Boyden had two hundred sixty-four votes for coroner.

.... had .... votes for coroner.

.... had .... votes for coroner.

Jacob T. Foster had three hundred eighty-five votes for county surveyor.

Gustav H. Carlson had two hundred ninety-nine votes for county surveyor.

.... had .... votes for county surveyor.

.... had .... votes for county surveyor.

Finley A. McDonald had four hundred seventeen votes for county commissioner from Fourth commissioners' district.

Daniel J. Wren had four hundred seven votes for county commissioner from Fourth commissioners' district.

James Sheahan had two hundred sixty-six votes for county commissioner from Fourth commissioners' district.

William J. O'Brien had two hundred sixty-seven votes for county commissioner from Fourth commissioners' district.

.... had .... votes for county commissioner from .... commissioners' district.

.... had .... votes for county commissioner from .... commissioners' district.

.... had .... votes for county commissioner from .... commissioners' district.

.... had . ... votes for county commissioner from .... commissioners' district.

Andrew Shuman had three hundred ninety votes for Presidential elector.

Isaac Lesen had three hundred ninety votes for Presidential elector.

Geo. Bass had three hundred ninety votes for Presidential elector.

John C. Tegtmeyer had three hundred ninety votes for Presidential elector.

86 John M. Smith had three hundred ninety votes for Presidential elector.

Jas. A. Sexton had three hundred eighty-nine votes for Presidential elector.

Albert J. Hopkins had three hundred ninety votes for Presidential elector.

Conrad J. Fry had three hundred ninety votes for Presidential elector.

William H. Shepard had three hundred ninety votes for Presidential elector.

Robert A. Childs had three hundred ninety votes for Presidential elector.

David McWilliams had three hundred ninety votes for Presidential elector.

Rufus W. Miles had three hundred ninety votes for Presidential elector.

John A. Harvey had three hundred ninety votes for Presidential elector.

Francis N. Davis had three hundred ninety votes for Presidential elector.

J. E. Otis Humphrey had three hundred ninety votes for Presidential elector.

Edward D. Blum had three hundred ninety votes for Presidential elector.

William O. Wilson had three hundred ninety votes for Presidential elector.

Rufus Cass had three hundred ninety votes for Presidential elector.

John H. Dunscom had three hundred ninety votes for Presidential elector.

Cicero J. Lindley had three hundred ninety votes for Presidential elector.

Jasper Partridge had three hundred ninety votes for Presidential elector.

Matthew J. Inscove had three hundred ninety votes for Presidential elector.

Orlando B. Ficklin had two hundred eighty-eight votes for Presidential elector.

John W. Doane had two hundred eighty-eight votes for Presidential elector.

James H. Ward had two hundred eighty-eight votes for Presidential elector.

87 James Moran, jr., had two hundred eighty-eight votes for Presidential elector.

James K. Blish had two hundred eighty-eight votes for Presidential elector.

Geo. C. Harrington had two hundred eighty-eight votes for Presidential elector.

William Prentiss had two hundred eighty-eight votes for Presidential elector.

Hiram P. Shumway had two hundred eight-eight votes for Presidential elector.

James R. Cunningham had two hundred eighty-eight votes for Presidential elector.

Eugene B. Buck had two hundred eighty-eight votes for Presidential elector.

Francis N. Youngblood had two hundred eighty-eight votes for Presidential elector.

William G. Ewing had two hundred eighty-eight votes for Presidential elector.

James T. Healey had two hundred eighty-eight votes for Presidential elector.

Harvey D. Colvin had two hundred eighty-eight votes for Presidential elector.

John F. Smith had two hundred eighty-eight votes for Presidential elector.

Michael W. Shurts had two hundred eighty-eight votes for Presidential elector.

George A. Wilson had two hundred eighty-eight votes for Presidential elector.

Henry Phillips had two hundred eighty-eight votes for Presidential elector.

William T. Kirk had two hundred eighty-eight votes for Presidential elector.

James C. Allen had two hundred eighty-eight votes for Presidential elector.

George Willis Atkins had two hundred eighty-eight votes for Presidential elector.

William K. Murphy had two hundred eighty-eight votes for Presidential elector.

.... had .... votes for Presidential elector.

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For adoption of the proposed amendment to the constitution of the State of Illinois, 697 votes.

Against adoption of the proposed amendment to the constitution of the State of Illinois....................votes.

89 For authorizing the county commissioners to issue bonds to the amount of five hundred thousand ($500,000) dollars for payment as an indebtedness created before the adoption of the present constitution of the State of Illinois, six hundred and ninety-seven votes.

Against authorizing the county commissioners to issue bonds to the amount of five hundred thousand ($500,000) dollars for payment on an indebtedness created before the adoption of the present constitution of the State of Illinois, ... votes.

For an appropriation by the city council of one hundred thousand ($100,000) dollars, from moneys derived from saloon licenses, for an increase of the police force, six hundred ninety-seven votes.

Against an appropriation by the city council of one hundred thousand ($100,000) dollars, from moneys derived from saloon licenses, for an increase of the police force, ... votes.

Certified by us.

S. P. SHIELDS,
P. M. HANSBROUGH,
S. STRAUSSER,
Judges of the Election.

Attest:
E. D. KELLEY,
M. SULLIVAN,
Clerks of the Election.

INSTRUCTIONS TO JUDGES AND CLERKS.

Judges and clerks to be sworn.

Before the opening of the polls the judges and clerks of the election are to be sworn by some magistrate. If no such magistrate be present, then the judges are empowered to swear each other and the clerks. The person administering the oath must make a minute of it in the proper place, and if he be a judge of the election, and not a magistrate, he must sign himself as such.

Vacancies in the board of judges.

If a judge of election be absent or refuse to act at the time of opening
90 the polls, the judge or judges present may appoint some other
qualified elector to act in his place. If there be no judge of election present, or he refuses to act, the legal voters present may fill the places of such judges by election from their number.

Opening and closing of the polls.

Polls open at 8 o'clock a. m., and must close at 7 o'clock p. m.

Proclamation.

When opening the polls, one of the clerks or judges of election shall make proclamation of the same, and at least 30 minutes before the closing of the polls proclamation shall be made in like manner, that the poll will be closed in half an hour.

No adjournment or recess allowed.

After the polls are open, there can be no adjournment nor recess until the votes are counted and the result publicly announced.

Ballots to be numbered.

The clerks are to number each voter as he enters his name on the poll list, in the order in which he votes, and the same number is to be placed on the ballot voted by said voter.

Poll-books.

After canvassing the votes, one poll-list of electors must be filed next day, with the tally-list, etc., of the election, with the county clerk.

Ballots.

The ballots, after being read and counted, are to be strung on a string in the order in which they are read, and then enveloped and sealed up by the judges, and returned with the election returns to the county clerk.

Poll-books to be signed and attested.

At the close of the polls the poll-books are to be signed by the judges and attested by the clerks.—Act Feb. 22, 1861, Sec. 6.

Returns of the election.

As soon as the returns of the election are made out and signed,
91 they must be put into the hands of one of the judges, who shall,
within two days, return them to the county clerk.

NOTE.—The returns should be put in an envelope and sealed up, and endorsed to the county clerk as returns from................ precinct or election district.

Doc. No. .... Poll-book.

....................district. Town of....................... Election held November 4th, 1884.

And thereupon the United States introduced in evidence the poll-book found among the returns of the second precinct of the 18th ward aforesaid, and known and designated throughout the trial as poll-book No. 2, the certificate attached to which is as follows:

N. A. Cool, No. 2.

NOTE.—The number of votes received must be expressed in words, at full length.

STATE OF ILLINOIS,
Cook County, City of Chicago, ss:

At an election held on the fourth day of November, A. D. 1884, in the 2d precinct of the 18th ward of the city of Chicago, in the county of Cook and State of Illinois, the following named persons received the number of votes annexed to their respective names for the following described offices, to wit:

Carter H. Harrison had two hundred and eighty-eight votes for governor.

Richard J. Oglesby had four hundred and eight votes for governor.

......................had..................votes for governor.

......................had..................votes for governor.

Henry Seiter had two hundred and sixty-eight votes for lieutenant-governor.

92 John C. Smith had four hundred and twenty votes for lieutenant-governor.

......................had..................votes for lieutenant-governor.

......................had..................votes for lieutenant-governor.

Michael J. Dougherty had two hundred and sixty-eight votes for secretary of state.

Henry D. Dement had four hundred and twenty-four votes for secretary of state.

......................had..................votes for secretary of state.

......................had..................votes for secretary of state.

Walter E. Carlin had two hundred and seventy-two votes for auditor of public accounts.

Chas. Swiegert had four hundred and twenty-one votes for auditor of public accounts.

......................had..................votes for auditor of public accounts.

......................had..................votes for auditor of public accounts.

Robt. L. McKinley had two hundred and sixty-nine votes for attorney-general.

George Hunt had four hundred and twenty-four votes for attorney-general.

......................had..................votes for attorney-general.

......................had..................votes for attorney-general.

Alfred Orendorf had two hundred and sixty-eight votes for State treasurer.

Jacob Gross had four hundred and thirty-one votes for State treasurer.

......................had..................votes for State treasurer.

......................had..................votes for State treasurer.

John P. Altgeld had two hundred and sixty-eight votes for member of Congress from..................Congressional district.

93 Geo. E. Adams had four hundred and twenty-five votes for member of Congress from..................Congressional district.

......................had..................votes for member of Congress from..................Congressional district.

......................had..................votes for member of Congress from..................Congressional district.

John McKeough had two hundred and seventy-one votes for member of the State board of equalization from..................Congressional district.

Christian Busse had four hundred and seventeen votes for member of the State board of equalization from..................Congressional district.

......................had..................votes for member of the State board of equalization from..................Congressional district.

......................had..................votes for member of the State board of equalization from..................Congressional district.

Michael J. Carroll had two hundred and seventy votes for clerk of the supreme court, northern grand division.

Alfred H. Taylor had four hundred and twenty-one votes for clerk of the supreme court, northern grand division.

......................had..................votes for clerk of the supreme court, northern grand division.

......................had..................votes for clerk of the supreme court, northern grand division.

Rudolph Brand had four hundred and seventy-four votes for State senator from................ .senatorial district.

Henry W. Leman had two hundred and twenty votes for State senator from..................Senatorial district.

......................had..................votes for State senator from...... ....senatorial district.

......................had..................votes for State senator from..... ....senatorial district.

Cornelius McAuliffe had three hundred and ninety-seven and .half votes for member of the house of representatives from..................senatorial district.

Stephen J. Sullivan had four hundred and five votes for member of the house of representatives from..................senatorial district.

94 Henry Boutell had six hundred and twelve votes for member of the house of representatives from..................senatorial district.

Eugene A. Sittig had six hundred ninety-eight and half votes for member of the house of representatives from..................senatorial district.

......................had..................votes for member of the house of representatives from.................senatorial district.

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......................had..................votes for member of the house of representatives from.................senatorial district.

William Curran had two hundred fifty-three votes for clerk of the appellate court of the First district.

John J. Healy had two hundred and thirty-eight votes for clerk of the appellate court of the first district.

........................had..................votes for clerk of the appellate court of the first district.

........................had..................votes for clerk of the appellate court of the first distrist.

Henry F. Donovan had two hundred and sixty-three votes for clerk of the superior court.

Patk. McGrath had four hundred and sixteen votes for clerk of the superior court.

........................had..................votes for clerk of the superior court.

95 .... had .... votes for clerk of the superior court.

Emil Hoechster had two hundred and seventy-five votes for clerk of the circuit court.

Henry Best had four hundred and thirteen votes for clerk of the circuit court.

.... had .... votes for clerk of the circuit court.

.... had .... votes for clerk of the circuit court.

Julius S. Grinnell had three hundred and forty-one votes for State's attorney.

Luther Laflin Mills had three hundred and thirty-three votes for State's attorney.

.... had .... votes for State's attorney.

.... had .... votes for State's attorney.

Joseph Donnersberger had two hundred and sixty-eight votes for recorder of deeds.

Wiley S. Scribner had four hundred and thirty-five votes for recorder of deeds.

.... had .... votes for recorder of deeds.

.... had .... votes for recorder of deeds.

Noel B. Boyden had two hundred and sixty-four votes for coroner.

Henry L. Hertz had four hundred and twenty-one votes for coroner.

.... had .... votes for coroner.

.... had .... votes for coroner.

Gustav H. Carlson had two hundred and fifty-nine votes for county surveyor.

Jacob T. Foster had three hundred and eighty-five votes for county surveyor.

.... had .... votes for county surveyor.

.... had .... votes for county surveyor.

James Sheehan had two hundred and sixty-six votes for county commissioner from .... commissioners' district.

96 W. J. O'Brien had two hundred and sixty-seven votes for county commissioner from .... commissioners' district.

Findlay McDonald had four hundred and seventeen votes for county commissioner from .... commissioners' district.

Danl. J. Wren had four hundred and seven votes for county commissioner from .... commissioners' district.

.... had .... votes for county commissioner from .... commissioners' district.

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.... had .... votes for county commissioner from .... commissioners' district.

.... had .... votes for county commissioner from .... commissioners' district.

Orlando B. Ficklin had two hundred and eighty-eight votes for Presidential elector.

John W. Doane had two hundred and eighty-eight votes for Presidential elector.

James H. Ward had two hundred and eighty-eight votes for Presidential elector.

James Moran, jr., had two hundred and eighty-eight votes for Presidential elector.

James K. Blish had two hundred and eighty-eight votes for Presidential elector.

Geo. C. Harrington had two hundred and eighty-eight votes for Presidential elector.

Wm. Prentiss had two hundred and eighty-eight votes for Presidential elector.

Hiram P. Shumway had two hundred and eighty-eight votes for Presidential elector.

Eugene B. Buck had two hundred and eighty-eight votes for Presidential elector.

Francis M. Youngblood had two hundred and eighty-eight votes for Presidential elector.

Wm. G. Ewing had two hundred and eighty-eight votes for Presidential elector.

Jas. T. Healey had two hundred and eighty-eight votes for Presidential elector.

Harvey D. Colvin had two hundred and eighty-eight votes for Presidential elector.

97 John F. Smith had two hundred and eighty-eight votes for Presidential elector.

Michael W. Sherts had two hundred and eighty-eight votes for Presidential elector.

Geo. A. Wilson had two hundred and eighty-eight votes for Presidential elector.

Henry Phillips had two hundred and eighty-eight votes for Presidential elector.

Wm. T. Kirk had two hundred and eighty-eight votes for Presidential elector.

Jas. C. Allen had two hundred and eighty-eight votes for Presidential elector.

Geo. Willis Atkins had two hundred and eighty-eight votes for Presidential elector.

Wm. K. Murphy had two hundred and eighty-eight votes for Presidential elector.

James R. Cunningham had two hundred and eighty-eight votes for Presidential elector.

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Andrew Shuman had three hundred and ninety votes for Presidential elector.

Isaac Lessem had three hundred and ninety votes for Presidential elector.

Geo. Bass had three hundred and ninety votes for Presidential elector.

John C. Tegtmeyer had three hundred and ninety votes for Presidential elector.

John M. Smith had three hundred and ninety votes for Presidential elector.

Jas. A. Sexton had three hundred and eighty-nine votes for Presidential elector.

A. J. Hopkins had three hundred and ninety votes for Presidential elector.

Conrad J. Fry had three hundred and ninety votes for Presidential elector.

W. H. Shepphard had three hundred and ninety votes for Presidential elector.

............................had..................votes for Presidential elector.

Robert A. Childs had three hundred and ninety votes for Presidential elector.

98 David McWilliams had three hundred and ninety votes for Presidential elector.

Rufus W. Mills had three hundred and ninety votes for Presidential elector.

John A. Hawley had three hundred and ninety votes for Presidential elector.

Francis M. Davis had three hundred and ninety votes for Presidential elector.

J. Otis Humphrey had three hundred and ninety votes for Presidential elector.

Edw. D. Blume had three hundred and ninety votes for Presidential elector.

Wm. O. Wilson had three hundred and ninety votes for Presidential elector.

Rufus Cass had three hundred and ninety votes for Presidential elector.

John H. Duncombe had three hundred and ninety votes for Presidential elector.

Cicero J. Hendley had three hundred and ninety votes for Presidential elector.

Jasper Wartlidge had three hundred and ninety votes for Presidential elector.

Mathew Inscove had three hundred and ninety votes for Presidential elector.

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........................had..................votes for Presidential elector.

For adoption of the proposed amendment to the constitution of the State of Illinois, six hundred and eighty-seven votes.

Against the adoption of the proposed amendment to the constitution of the State of Illinois..................votes.

For authorizing the county commissioners to issue bonds to the amount of five hundred thousand ($500,000) dollars for payment on an indebtedness created before the adoption of the present constitution of the State of Illinois, six hundred and eighty-seven votes.

Against authorizing the county commissioners to issue bonds to the amount of five hundred thousand ($500,000) dollars for payment on an indebtedness created before the adoption of the present constitution of the State of Illinois..................votes.

For an appropriation by the city council of one hundred thousand ($100,000) dollars from moneys derived from saloon licenses for an increase of the police force, six hundred and eighty-seven votes.

100 Against an appropriation by the city council of one hundred thousand ($100,000) dollars from moneys derived from saloon licenses for an increase of the police force.. ....

Certified by us.

S. P. SHIELDS,
S. STRAUSSER,
P. M. HANSBROUGH,
Judges of the Election.

Attest:

....
....
Clerks of the Election.

INSTRUCTIONS TO JUDGES AND CLERKS.

Judges and clerks to be sworn.

Before the opening of the polls the judges and clerks of the election are to be sworn by some magistrate. If no such magistrate be present, then the judges are empowered to swear each other and the clerks. The person administering the oath must make a minute of it in the proper palce, and if he be a judge of the election and not a magistaate, he must sign himself as such.

Vacancies in the board of judges.

If a judge of election be absent or refuse to act at the time of opening the polls, the judge or judges present may appoint some other qualified elector to act in his place. If there be no judge of election present, or he refuses to act, the legal voters present may fill the places of such judges, by election from their number.

Opening and closing of the polls.

Polls open at 8 o'clock a. m. and must close at 7 o'clock p. m.

Proclamation.

101 When opening the polls one of the clerks or judges of election shall make proclamation of the same, and at least 30 minutes before the closing of the polls proclamation shall be made in like manner that the polls will be closed in half an hour.

No adjournment or recess allowed.

After the polls are open there can be no adjournment nor recess until the votes are counted and the result publicly announced.

Ballots to be numbered.

The clerks are to number each voter as he enters his name on the poll-list in the order in which he votes, and the same number is to be placed on the ballot voted by said voter.

Poll-books.

After canvassing the votes one poll-list of electors must be filed next day with the tally-list, etc., of the election with the county clerk.

Ballots.

The ballots, after being read and counted, are to be strung on a string in the order in which they are read, and then enveloped and sealed up by the judges, and returned with the returns to the county clerk.

Poll-books to be signed and attested.

At the close of the polls the poll-books are to be signed by the judges and attested by the clerks. (Act Feb. 22, 1861, sec. 6.)

Returns of the election.

As soon as the returns of the election are made out and signed they must be put into the hands of one of the judges, who shall within two days return them to the county clerk.

NOTE.—The returns should be put in an envelope and sealed up and endorsed to the county clerk as returns from precinct or election district.

102 S. W. **FALLIS** was then recalled, and identified two hundred and thirty of the ballots in evidence, returned from the second precinct of the 18th ward as having been printed from the heading engraved by him as already testified.

The tickets were exhibited to the jury. Upon each of them appeared the name of Rudolph Brand instead of Henry W. Leman for State senator. All the other names upon each of these tickets were those of the regular Republican nominees at that election.

E. D. **KELLEY** was recalled as a witness in behalf of the United States, and was shown the tally-sheet put in evidence, whereon were the tallies for Brand and Leman for State senator. He testified: That is my name written on that tally-sheet; it is not my signature. Neither was it written by authority. I never saw that tally-sheet until I was before the grand jury of Cook County. The poll-book No. 1, on which the erasures appear, was shown witness, and looking at the certificate he identified his signature there as genuine.

Poll-book No. 2, which was returned among the ballots, was shown witness, and he was asked about his signature there, when he called attention to the fact that there was no signature there purporting to be his, nor that of the other clerk.

The spaces for the signatures of the clerks were left blank.

Cross-examined:

I was indicteed in this court with the other clerks and judges.

C. K. Lush recalled, testified that after he got the ticket from Beers he gave it to Melville E. Stone.

Max Fries was sworn as a witness for the United States and testified: The 21st of last November was book-keeper for the P. L. Hanscom Printing Company; that day I came there, saw the defendant Mackin
103 consulting with S. B. Wright; he called down his brother Will;
said he had a job he wanted to get out for Mackin, and wanted to have it kept secret. Mackin said he would like to have Rudolph Brand's name substituted in place of Leman's. Jerry S. Thompson came into the office and Wright cut off the head of the Republican ticket and handed it to Thompson to get a duplicate.

Charles S. Powers was sworn as a witness for the United States, and testified:

November and December last I was a reporter for the Chicago Times. When the question was under discussion as to the right of the grand jury to have produced the poll-books, tally-sheets, and ballots of the second precinct of the Eighteenth ward I saw defendant Mackin, either in this corridor or in that upstairs. We were talking about it, and Mackin asked me if I could not persuade Ryan not to take them in, or something to that effect. He may have said: "Tell him you fellows will stand by him."

Q. Whom did you understand by "you fellows"?

A. I don't know, the paper, I suppose, or myself, or anybody else.

Cross-examined:

Q. Did you understand that remark to be made in a jocular manner?

A. I did not pay enough attention to it to understand anything about it. Public opinion at that time was strongly divided on the production of the ballots and returns.

William A. S. Graham was sworn as a witness for the United States, and testified:

Am a reporter for the Chicago Times. The 24th of last November, after the matter of the ballots, etc., had been decided by this court, I met the defendant Mackin in the corridor; told him the ballots would be produced, I guessed; he began to laugh; said he did not believe any fraud had been committed; if there had, I might bet all the cigars I wanted there wouldn't be so many pasters found on the tickets as had been talked about or supposed. There was a theory that two frauds had been committed; once with pasters and afterwards by the substitution of ballots.

104 Cross-examined:

There was a theory that Republicans were largely responsible for it; General Chetlain told me there was a very bitter feeling among the Republicans to the election; another theory was that General Logan's friends did not want to have Leman elected.

Edward Hood was sworn as a witness for the United States, and testified:

Was employed by the Republican central committee as watchman over the vault at the county clerk's office containing the election returns; went on duty on the morning of the 7th of November last; watched there daytimes until the evening of the 21st of November at five o'clock; saw the defendants, Gleason and Biehl, daily going in and out of the vault, sometimes alone and sometimes together; another one of the clerks, Hayes, got the returns from the vault for the canvassing board as they were wanted; about three o'clock Friday afternoon, November 21st, Biehl and Gleason went into the vault hunting for returns; Gleason told me they were looking for the ballots of the second precinct of the Eighteenth ward; finally Biehl held up one of the large envelopes such as ballots are contained in; Gleason went over and looked at it, and Biehl went over to the east side of the vault with it.

Melville E. Stone was sworn as a witness for the United States, and testified:

I am editor of the Daily News; C. H. Lush, a reporter on that paper, delivered to me this paper (the paper exhibited to witness was the tympan-proof ticket, identified by the witness Beers and the witness Lush); I authorized Lush to pay $25 for it; witness was shown a package of 230 tickets, picked out from among those put in evidence as returned from the second precinct of the Eighteenth ward by witness Fallis, as printed from engraving made by him; witness (M. E. Stone) was also handed the other
ballots among said returns, which were testified to be the genuine
105 Republican tickets; testified he was an expert practical printer;
that the two tickets, or two kinds of tickets, could not have been
printed from the same form; there were differences in type used in printing the titles of officers on the respective tickets; the words "for governor," "for secretary of state," in the tickets identified by the witness Fallis, are in what is known as the antique, or Caledonian order of letter; in the ticket identified as the genuine Republican ticket these words are printed in what is known as Roman title order of letter; the difference between them is quite marked, though a man not a printer might not discover it; the words "18th ward" on the ticket identified by the witness Fallis are printed in a letter more extended than that used in the regular Republican ticket; there is also more space between the engraved head and the type on this than there is on the genuine Republican ticket; this is shown by measurement which I made; the proof identified by Beers and Lush unqestionably was printed from the same form as these tickets identified by Fallis.

Court adjourned.

Wednesday morning, *February* 11, 1885.

Court reassembled, parties and jury present, and Hamilton B. Dox was sworn as a witness for the United States, and testified:

The fourth of last November, at the second precinct of the Eighteenth ward, I voted the regular Republican ticket. Henry W. Leeman's name was on my ticket for State senator. The district attorney read from the poll-book in evidence from among the list of voters, "Dox, H. B., 257 Dearborn avenue," number of his vote, as shown by poll-book, being 161. Witness said, "that is my name; my number is 357, instead of 257, Dearborn avenue." Ballot number 161, from among those in evidence from the second precinct of the Eighteenth ward, was shown witness, who said: That is not the ticket I voted; this contains the name of Rudolph Brand, which was not on the ticket I voted; there is also torn off this ticket the $531,712 appropriation, and for the proposed amendment to the constitution, which were not torn from my ticket.

106 MILTON C. LIGHTNER was sworn as a witness for the United States, and testified:

I voted ticket number 180 at the second precinct of the Eighteenth ward, at the November election. I looked at it especially to see that the name of Henry W. Leman was on it. On poll-book number 1 that is shown me I see my name and address correctly, with the number of my vote, 180. Ticket 180, from among those returned from the second precinct of the Eighteenth ward, being also one of those identified by Fallis as printed from the engraving made by him, was exhibited to witness, who said, that is not the ticket I voted. The name of Rudolph Brand is on this ticket instead of Henry W. Leman. On the ticket I voted there was also a paster which I put on.

JOHN O'LOUGHLIN was sworn as a witness for the United States, and testified:

Myself, John G. Shields, and the defendants Biehl and Gleason, all clerks in the office of the county clerk, were the only persons who had the combination to the vault in county clerk's office, where returns were kept in November last.

WILLIAM I. HOLLAND was sworn as a witness for the United States, and testified:

That at the last November election he voted at the second precinct in question. His vote was number 599. The poll-book in evidence on which the erasures appear was shown witness, and he pointed out where his name and address and number of his vote were correctly entered therein. Ballot number 599, from among those returned from the second precinct in question, was exhibited to witness, and he swore it was not the ticket he voted. He noticed particularly that the name of Leman was on the ticket he voted; instead that of Brand appeared on the ticket shown him.

107 JOHN N. JEWETT was sworn as a witness for the United States, and testified that at the precinct in question, on the fourth of November last, he voted ballot number 193, immediately after his own son, Edward R., voted. The poll-book corresponded with the witness' statement. Ballot number 193, from among those identified by the witness Fallis, was exhibited to witness, who testified it was not the ballot he voted. He voted the straight Republican ticket.

JAMES H. DOLE was sworn as a witness in behalf of the United States, and testified:

Henry W. Leman was my son-in-law, and I was especially careful to see that his name was on the ticket that I voted at the precinct in question, in November last. My name and address are correctly entered in the poll-book shown me. The number is 401. (Ballot bearing that number taken from among those identified by the witness Fallis was shown witness, and he testified :) That is not the ballot I cast. This has on it the name of Rudolph Brand for State senator, instead of that of Henry W. Leman. I saw my ballot put in the box. This is not it.

Charles Dole was sworn as a witness in behalf of the United States, and testified :

I voted at the precinct in question at the last November election. My name and address are correctly entered on the poll-book in evidence shown me. My vote is entered there as number "692." (Ballot number "692," being one of those identified by the witness Fallis, was exhibited to witness. And he continued :) That is not the ticket I voted. The name of Henry W. Leman for State senator was upon the ticket I voted. He is my brother-in-law and I was careful to see it was there. On this ticket the name of Rudolph Brand appears for State senator.

Augustus H. Burley was sworn as a witness in behalf of the United States, and testified:

108 I don't know any other A. H. Burley in the ward. (The poll-book in evidence, bearing erasures, was shown witness and he continued:) The name entered here as that of voter casting ballot number "246" is my name, but it is not spelled correctly, the last syllable being spelled here "l-e-i-g-h." I live on Dearborn avenue, number 254; the number here is 245. Ticket number 246 (being one of those identified by the witness Fallis) is not the ticket I voted at that election. I know I voted for Henry W. Leman for State senator. My ticket was not torn, as this one is, and the name of Rudolph Brand for State senator appears on this ticket.

John B. Shields was sworn as a witness in behalf of the United States, and testified :

That he was the vault clerk mentioned by the witness O'Loughlin in his testimony. Himself, O'Loughlin, and defendants Gleason and Biehl alone had the combination to the vault. Know that a search for the ballots of the precinct in question was made by defendants Gleason and Biehl and by Mr. O'Hare and Mr. Sweeney.

William O'Hare was sworn as a witness in behalf of the United States, and testified that he assisted Sweeney and the defendants Gleason and Biehl in their search for the ballots of the precinct in question. I was called out while the search was in progress. Don't know whether they found them. When I went back defendant Gleason or Biehl, I do not know which, said: "You need not make any search; put those back."

E. C. Blum was sworn as a witness for the United States, and testified: I voted at the precinct in question on the fourth of November last. The poll-book shown me (being that in evidence, bearing the erasures) correctly records my name and residence, and shows that my ballot was number 175. The ballot number 175 (selected from among those identified by the witness Fallis) was exhibited to witness. He continued: That is not the ballot I voted. I noticed especially, because I was interested in him, that the name of Henry W. Leman was on the ballot I voted as candidate for State senator; this bears instead the name of Rudolph Brand.

109 EDWARD R. JEWETT was sworn as a witness in behalf of the United States and testified that he voted ticket 189 at the precinct in question at the last November election. The poll-book shown last preceding witness was produced, and it appeared that the same residence and number of vote of the witness, as testified by him, were there duly entered. Ticket 189 being selected from among those identified by the witness Fallis was exhibited to witness. He continued: That is not the ticket I voted. I examined particularly, and know the name of Henry W. Leman as candidate for the State senate was on the ticket I voted. Here the name of Rudolph Brand appears.

JOHN B. KITCHEN, who voted at the precinct in question ticket number 165, and ROCKWELL KING, who at the same precinct and same election voted ballot number 211, respectively testified to the same effect as the last preceding witness respecting the ballots voted by them, and the ballots selected from among those identified by the witness Fallis, and numbered respectively "165" and "211." The witness King also testified that he acted as ticket peddler all day at the precinct in question, and was especially on the lookout for combinations on the various tickets, but saw no Republican ticket such as exhibited here bearing the name of Rudolph Brand.

CHARLES HARPELL was sworn as a witness in behalf of the United States, and testified that in behalf of the Chicago Historical Society he made a special effort to collect from all the polling places in the city samples of all the tickets in the field in the last November election. The society had representatives at 170 of the polling places in the city. They served without pay. I examined all the samples they sent us carefully; there was none among them like the tickets here identified by the witness Fallis. (United States here put in evidence a letter written by the defendant Gleason to the editor of the Chicago Daily News, in which Gleason protested his own innocence, but said that either himself or Biehl must have been in complicity with the fraud charged in this case.)

110 CHARLES D. WRIGHT was sworn as a witness in behalf of the United States, and testified: In November last I was a reporter on the Chicago Tribune. I saw the defendants Mackin and Gallagher during the time the election frauds in the second precinct of the Eighteenth ward were under investigation by the United States grand jury, together, here, quite often in the corridor.

Saw the defendant Mackin here on the 21st of last November, when County Clerk Ryan went before the grand jury. When Ryan came out, Mackin spoke to him. At that time I heard Mackin say that Ryan did not propose to expose the ballot-box to the eighteen pensioners.

He said the ballots must be kept under lock and key for a certain length of time, and therefor would not be exposed. I have seen defendants, Gallagher and Mackin, on the street, walking, once or twice on the street together. When Ryan appeared before the grand jury there were probably twenty-five or thirty men in the corridor here. Everybody was discussing whether the jury had jurisdiction of the offense. I saw other persons than Mackin speak to Ryan after he came out of the jury room; heard from other persons that Ryan would not produce the ballots before the United States grand jury. It was common talk around here.

BURKE WATERLOO was sworn as a witness for the United States, and testified: I was a reporter for the Chicago Tribune during November and December last.

One night at the Palmer House, several days after Ryan was subpœnaed to produce the ballots before the United States grand jury, Mackin said to me that if they would examine the boxes of the other precincts of the Sixth senatorial district, Brand's majority would be about fifteen hundred. He said it was ridiculous to suppose that those tickets with Brand's name on them were turned loose only in the second precinct of the Eighteenth ward, and that he would bet a thousand to five hundred dollars he could find an engraver who would engrave the scroll word for the heading inside of two hours.

111 Cross-examined:

This was just a jocular conversation. It was a discussion such as everybody around the hotels at that time was engaged in.

LE GRAND ODELL was sworn as a witness on behalf of the United States, and testified as follows:

I know the defendant Gallagher; acted with him as an inspector of election in October, 1883; defendant Gallagher then wrote a part of the names and addresses in the registry book in my presence; I saw him write them and know his handwriting; I noticed his handwriting that day; I have looked at his writing in that registry book many times since; I know his handwriting. The tally-list in evidence, on which appeared the vote for State senator, was shown the witness. Witness produced the registry book, about which he testified.

(Counsel for defendant Gallagher objected to the introduction of the registry book, or to any comparison of it, with the tally-list. The court ruled that the witness might look at the writing in the registry book which he saw Gallagher write in order to refresh his recollection, but that he could not compare the registry book with the tally-list in question. After looking at the registry book he might say from his own knowledge of the defendant's handwriting whether the tally-list was in the defendant's, Gallagher's, handwriting. To which ruling the defendant Gallagher, by his counsel, excepted.)

The witness answered: I should think the handwriting was the same.

By Gen. HAWLEY, for the United States:

Q. Now, your honor, I ask the same question after he has answered; I ask him to look at the registry list, which he has before him, for the purpose of fortifying his opinion?

(To which question defendant Gallagher, by his counsel, objected, which objection was overruled; to which ruling of the court the defendant Gallagher then and there by his counsel excepted.)

112 After witness had looked at the names and writing in the registry list, which he testified he saw defendant Gallagher write, he was shown the certificates attached to poll-book No 2, in evidence, and asked to state by whom, in his opinion, the same was written.

A. I think the handwriting is the same as written in the registry book.

Q. Whose handwriting do you think it is?

A. I should think it is the defendant Gallagher's. I think the figures on the tally-list in evidence shown me are in his handwriting.

Cross-examined:

I am fifty-three years old. Have worn glasses two years. Have some impairments of my eyesight—not very much. Gallagher wrote in the registry book in October, 1883. First looked over that book; picked out Gallagher's writing when I heard of his arrest. I knew I had some of his writings, and began to hunt it up. I think I told District Attorney Tuthill of this as soon as I did any one. I saw A. M. Day, of the citizens' committee, about the same time. I met J. B. Keeler on the street—on Fifth avenue; told him about it; he took me and introduced me to A. M. Day. I told Day I had the registry. I had seen reports in the newspapers that a large reward was offered by the citizens' committee for evidence which would lead to the conviction of persons charged with this fraud. I delivered the book to District Attorney Tuthill and Marshal Jones after I had seen Mr. Day. Don't know whether it was the same day or the next. When I brought the book I pointed out to them certain names which I had seen Gallagher write. I have looked it over several times since.

Q. If you had never been allowed to see that registry book from the time you left that place where it was made until you came here to testify, would you have said under oath that you could tell the handwriting of the defendant Gallagher?

A. No, sir; I couldn't do that, because I never saw him write before.

Re-examination:

Gallagher wrote twenty names in the registry book. He signed his name to it. I wrote four-fifths of it; there were 600 names.

113 Recross:

I observe you looking at some memorandum; are you looking at it to aid your memory?

A. I had the names of each of these——

Q. Have you not a digest or index of that matter prepared?

A. No, sir; you can see it is the figures (counting it up).

Witness handed the paper to counsel.

Q. When did you make this memorandum?

A. Yesterday; I went over the book to count the number of names written by each man.

Q. And you have been testifying about it here when you testify as to the number?

A. Well, yes; I had not anything to do, and I went into Mr. Tuthill's office yesterday and counted them up.

RUDOLPH BRAND was sworn as a witness for the United States, and testified that he had been a candidate for the State senate in the Sixth senatorial district at the election held in November last; and that he had no knowledge of the use of and had not authorized the use of any such ticket as those identified by the witness Fallis, and in evidence, and had not paid or been asked to pay for printing them.

CHARLES H. GOOD was sworn as a witness in behalf of the United States, and testified: I am deputy clerk in the court of oyer and terminer and the court of sessions at Philadelphia, Pa. Knew the defendant Gallagher intimately, at Philadelphia, for about ten years. Think I know his handwriting. I have seen him write I suppose about fifty times. (Tally sheet in evidence was shown witness, and continuing, he said:) He thought it was in Gallagher's handwriting. I think the figures, also, are his. Witness was shown the certificate attached to poll-book No. 2, and said that in his opinion that also was in the handwriting of Gallagher. Witness had some writing of Gallagher's in his possession, and was asked what it was.

(Question was objected to.)

114 COURT. The rule is simply this: that a witness, if he has any handwriting in his possession which he knows to be the handwriting of the defendant, may examine that for the purpose of verifying the impressions or conclusions to which he came upon his examination. The paper to which he refers does not become evidence. It is not here for the purpose of being compared. He is permitted to examine it, simply to verify his own conclusion, to refresh his recollection, so to speak.

Q. You may now take the paper which you have in your possession which you know to be in his handwriting, if you have such paper or papers, and verify or fortify your opinion on the matter of his handwriting.

(This question was objected to by defendant Gallagher, which objection the court overruled, to which ruling of the court defendant Gallagher excepted.)

Q. (By the COURT.) Examine it and see if your opinion is confirmed or otherwise?

A. The witness produced the paper referred to, and looked at it. He then looked at the tally-list and poll-book No. 2.

Q. What is the result of your examination?

A. They compare favorably with the writing of Gallagher that Gallagher himself wrote in Philadelphia.

Q. Are you, then, still of the opinion that the papers I handed you are in his handwriting?

A. I am, sir.

Cross-examined:

I last saw Gallagher write in 1881. I was subpœnaed at Philadelphia. I was spoken to about being a witness in this case about two or three weeks before I was subpœnaed, by Isaac P. White, custodian of the records of the court of Philadelphia. I was shown a poll-book, I believe, or something supposed to be a poll-book, before I came on the witness stand. It might have been an hour or two, or three, ago. An elderly man there turned over the book and asked me if I could pick out any writings that I supposed was Gallagher's; don't know that that was Odell, the witness that has just left the stand. I pointed out to him the parts of that writing which I recognized. I might have been introduced to him by the name of Odell. I do not remember.

115 ALFRED S. YOUNG was sworn as a witness in behalf of the United States, and testified:

I am a broker at Philadelphia. Note broker. I know the defendant Gallagher; know his handwriting. Have seen him write three or four times, and he has left notes at my office to make appointments with me, which appointments he kept. Witness was shown the tally-list in evidence and the certificate attached to poll-book No. 2, and in answer to question, said that he should think both were in the handwriting of the defendant Gallagher. Witness was permitted to examine a paper in his own possession which he testified was written by Gallagher, in order to verify his opinion, as was done by the last preceding witness, under the same rule, and subject to the same limitations and exceptions in behalf of the defendant Gallagher, and answering, said: The result of my examination is to confirm my opinion that *that* they are in the same writing, and that is the writing of the defendant Gallagher.

ALBERT M. HIRSH was sworn as a witness on behalf of the United States, and testified:

Am assistant civil engineer in the department of public works at Chicago.

Know the defendant Gallagher; he was employed under my direction from November, 1883, to May, 1884; have seen him write; have a specimen of his writing with me, and am ordinarily familiar with his handwriting.

(Witness was shown the tally-sheet in evidence and. asked as to his opinion as to who wrote that.)

A. Some of the writing looked like Gallagher's. The whole of it I would not be inclined to declare such, in my opinion. Of some of the names I would be inclined to say positively they are his writing. The figures look like Gallagher's.

116 (Witness was shown the certificate attached to the poll-book No. 2, in evidence, and asked his opinion as to whose handwriting that was in.)

A. It looked very much like Gallagher's, particularly the "e's" and the "s's," and certain other parts of the alphabet. They are so very much like his that I would assume at the first glance that it was his. I would assume that at a second glance, too.

Q. Now, take a glance at the specimen of his handwriting you have in your pocket. Look particularly at the figures, and when you have done that, please look at the figures on the tally-sheet first shown you.

(This question was asked under the ruling of the court, as the similar question asked the witness Odell, and subject to the same restrictions and the like exception by the defendant Gallagher.)

A. They look very much alike

St. Clair Sunderland was sworn as a witness on behalf of the United States, and testified as to the examination of the ballots in evidence before the grand jury, to the effect that the same were handled with great care and were replaced upon the string and in the box, in the same order in which they were found when produced.

Court adjourned.

Thursday, *February* 12, 1885.

Court convened, pursuant to adjournment, jury and parties being present.

James Sullivan was sworn as a witness on behalf of the United States, and testified:

Am a reporter of the Chicago Tribune. Soon after the ballots were opened by the United States grand jury in this case I had a conversation with the defendant Gleason; he said he received the ballots in question Tuesday after the election; he, Gleason, put them into the vault; subsequently he told me the ballots were kept in a locked box in the
117 vault, of which he and Ryan had the keys; afterwards told me
that although Ryan had a key it was deposited in a safe, to which he, Gleason, alone had access. He took me again into the vault, showed me the box, and said that under no possible circumstances could those ballots have been taken out without his knowing it; he wished he was as sure of a million dollars as he was of that, for he had the key all the time. This was before he testified before the grand jury; when he came out of the grand-jury room I was in this building, followed him down stairs, and said: "I understand you told the grand jury those ballots were never in the locked box." He hesitated, but finally said it was an infamous lie; afterwards, he admitted that before the grand jury he testified those ballots were in the nailed box. I said: "Was the cover nailed down?" He said: "Well, he didn't know." Sweeney, who stood by, said it could not have been nailed down; that it had been pried open in order that the returns might be carried before the canvassing-board. Gleason said Biehl took the ballots from that box and put them in the tin box, number "244." He made the change because Ryan told him to be careful with the returns. Ryan himself didn't tell him that. He told it through Hayes, who brought the returns from the canvassing-board rooms. After some question he told me that he didn't tell Ryan of the change. Subsequently, in the same conversation, he withdrew that statement and said he did not tell Ryan. He withdrew that statement when I brought the three together—Ryan, Gleason, and myself. Saw defendants Mackin and Gallagher together before the building here the day Mackin went before the grand jury. Saw them in conversation together. Saw them afterwards, I think, but am not sure of that, talking before the grand-jury room. I saw them together at various times and places, but not in conversation. By together, I mean both in the same place. When Gallagher was examined before Justice Lyon I saw Mackin there. He did not say anything to the justice. I saw him consult the attorney of Gallagher.

Cross-examined:

The proceedings attracted a good deal of attention, and there was quite a crowd there.

118 THOMAS P. TOLMAN was sworn as a witness in behalf of the United States, and testified:

I am cashier of the Traders' Bank of this city. Have been in the business for some thirty odd years; commenced as an errand boy. Twelve or fifteen years ago I was paying teller. It was my business to pass on handwriting and examine it. Witness was handed the tally-sheet in evidence, showing the vote for State officers, etc., and also the poll-book No. 2 in evidence. He was asked to compare them, the comparison being made with that part of the poll-book referred to in the testimony as the certificate, being the certificate appended by the clerks and judges showing the number of votes received by each candidate, and asked if the same were in the same handwriting.

A. I don't think they are. I have no hesitation in saying that the name of John P. Altgeld as it appears on the poll-book and tally-sheet is in the same handwriting. I don't think—my impression and belief would be—that the name of Richard J. Ogelsby is in the same handwriting—I don't think, at the same time it might possibly be. I don't think my opinion amounts to much any way, and then my eyes are against me.

DAVID VERNAN was sworn as a witness in behalf of the United States, and testified:

Am assistant cashier of the Commercial National Bank. I have been in the banking business for seventeen years.

The tally-sheet in evidence now shown me and the certificate to the poll-book No. 2 shown me I should say are in the same handwriting. In my judgment the figures are in the same handwriting on each.

HENRY R. TOLLMAN was sworn as a witness in behalf of the United States, and testified:

Am a reporter for the Tribune. Have had experience in the National Bank as a book-keeper and as a microscopist in the examination of handwriting. Have made it a study. In my opinion, the tally-sheet in
119 evidence shown me and the certificate on the poll-book No. 2 are
in the same handwriting. In my opinion, the figures on the back of the ballots shown, being a number of those identified by witness Fallis, are in the same handwriting. The only one about which I have any doubt is the ticket numqered 173. I have no doubt about the others.

MALCOMB JAMIESON was sworn on behalf of the United States, and testified:

Have been receiving teller of the First National Bank and paying teller for eleven years altogether. It is part of my business to examine handwriting. In my opinion, the tally-sheet in evidence now shown me and the poll-book on which the erasures do not appear, designated as poll-book No. 2, so far as relates to the certificate on that poll-book, are in the same handwriting; my opinion is that they were written by the same party. Have no doubt about it. The numbers on the ballots which are shown to me (being ballots which were identified by the witness Fallis), in my opinion, also were written by the same hand. I never saw any of these documents until now.

Daniel Scully was sworn as a witness in behalf of the United States, and testified:

I am one of the justices of the peace of Cook County, Illinois, and as such was called upon to act as a member of the canvassing board, the canvass of last election.

When we opened the returns of the second district of the Eighteenth ward we noticed the erasure in the certificate. The poll-book shown me is that about which I speak. I see here now the erasure after the name of Henry W. Leman, on the opposite margin, where the number of votes is carried out, with the word "two" written over it, the word "two" being followed by "two hundred and twenty." I see, also, the erasure opposite the name of Rudolph Brand; over the erasure is written the word "four," followed by the words "one hundred and seventy," making the sentence "four hundred and seventy." These numbers, and those opposite the name of Leman, are in the certificate signed by the clerks and
120 judges, showing the number of votes received by Brand and Leman, respectively, as candidates for the State senate in the Sixth senatorial district. Justice Kersten and I then examined the tally-sheet; it was the same in evidence now shown me. We found it corresponded with the poll-book.

Representatives of both political parties were present, and made arguments on the question of our going behind the returns and hearing evidence. This was Thursday afternoon, to which we had continued the matter after discovering the erasures. During the argument the judges came into the room. I only knew Mr. Hansborough, but I understood they were there. Dr. Strausser, I learned that was his name, was in front of us, and spent some twenty minutes in examination of this tally-sheet. We decided at two o'clock on Saturday the 22d that we could not go behind the returns. County Clerk Ryan then announced that it was desired that any of the judges who had any explanation to make should come forward and make it. They made no explanation. At that time there was but one poll-book in the returns. That was this poll-book No. 1, on which the erasures appear. This other poll-book (designated as No. 2) I don't think I ever saw.

George Kerstens was sworn as a witness for the United States, and testified:

That he was a member of the county canvassing board. His statement in all material particulars corroborated that of the preceding witness, Scully.

He testified further that, upon the face of the returns, taking that from the second precinct of the Eighteenth ward, on which the erasures appeared as the return, Rudolph Brand was elected State senator by a majority of ten votes over Leman.

Edward H. Emery was sworn as a witness in behalf of the United States, and testified:

In November and December last was a reporter for the Chicago News; as such I was about this building every day while the grand jury
121 was investigating the Eighteenth ward election frauds. I saw the defendants Gallagher and Mackin together in this building

several times. I saw them together at the investigation and examination before Commissioner Hoyne. That was the examination of Gallagher alone. I saw Mackin at Justice Lyon's office. He came in ten or fifteen minutes after Gallagher did. The proceedings were against Gallagher. At the time of the investigation before the United States grand jury I know that various gentlemen were around here trying to find out what was going on. Have seen Mackin and various other people at different times; so also Gallagher.

G. PIERCEY ENGLISH was sworn as a witness for the United States, and testified:

I am a reporter for the Tribune. I was present in Judge Shepard's court three, four, or five times when the habeas corpus for Gallagher issued upon the requisition for him from Pennsylvania was called up. Think I saw Mackin there every time. There were a good many people in the court-room each time.

N. A. COOL was recalled as a witness for the United States, and testified:

The United States grand jury went to the county clerk's office to examine the vault there. Defendant Gleason was there. He then said the ballots of the second precinct were kept in the box locked with the Yale lock. Afterwards he produced the keys before the grand jury. After a good deal of questioning he finally admitted that the ballots had never be'n in that box. They had been kept in the nailed box. The defendant Joseph C. Mackin was before the United States jury.

Q. Was he asked to give an account as to what he did with the ballots delivered to him by the Wrights?

(Objected to by the defendants.)

District Attorney TUTHILL to the court: "I do not propose to offer proof as to any testimony that Mackin gave before the grand jury, 122 but simply to prove that he refused to give any testimony, and the ground he gave for his refusal."

(Defendants objected.)

The court ruled that the testimony might be admitted for the time, but stated to the jury that it might be excluded if he should conclude it was inadmissible, and that the jury should hear it with the understanding that it might be ruled out.

Witness then proceeded to answer: Mackin was asked to give an account as to what he did with the ballots delivered to him by the Wrights. He refused to answer, for the reason that he might, or would—don't know which word he used—might criminate himself.

(To the admission of which answer defendants excepted.)

Cross-examined:

Mackin had been sworn as a witness before any questions were asked him.

Court here took a recess and reassembled at two o'clock p. m.

CHESTER M. DAWES was recalled as a witness for the United States, and under the same ruling and subject to a like exception as in case of preceding witness, testified, and the testimony was allowed, subject to be excluded in case the court should, after consideration, deem it inadmissible.

I was in the grand-jury room when defendant Mackin appeared there. Heard him asked "whether or not he ordered tickets which have been put in evidence in this case from the Wrights." First he asked whether he was compelled to answer. He was informed that he was. He then said he declined to answer, on the ground that his answer might tend to criminate himself. He was sworn as a witness before the grand jury before these questions were asked him. The testimony of the Wrights had before that time been heard by the grand jury.

123 G. A. MARINER was then called as a witness for the United States, and, being sworn, testified:

During the past twenty-five years I have had considerable experience in the examination of handwriting by means of the microscope and otherwise. Consider myself qualified as an expert upon that subject. Have a number of times testified as to handwriting. Witness examined the tally-sheet in evidence (being the same which the witness Kelley testified as not being signed by him, and that his name appearing thereon was not written by him nor with his authority) and compared it with the poll-book No. 2, being that found in the envelope with the ballots, and on which no signatures of those purporting to be clerks of election were appended. He was asked to state whether they were in the same or in different handwriting. Witness spent some time in the examination.

Q. State what is the result of your examination.

A. I don't see sufficient difference.

Q. Is it your opinion they are in the same handwriting?

A. I would not be prepared to say they are in different handwriting. I see differences, but I would not wish to or feel justified sufficiently to state that they are in different handwritings.

Q. State whether it is your opinion or not that it is in the same handwriting.

A. I think they are.

Witness was handed poll-book No. 1, and his attention called to that part of the same where are written opposite the names of Henry W. Leman and Rudolph Brand the number of votes received by them respectively for State senator.

Q. State whether you notice an erasure there?

A. I find that the word "two" here used to state the number of votes passed for Leman occupies a space previously occupied by another word. The previous word commenced with a capital "F." The erasure of the cross mark of the "F" and of the small letter of the previous word are distinctly visible with a moderate magnifying power. The spreading or blotting of ink where the letters "wo," following what is now a capital "T" 124 in making the word "two," is distinctly visible. Can't tell what the erased word beginning with a capital "F" was. It must have been either four or five. There is not space to have written fifteen or fourteen. The manner of the erasure and what remains shows it could not have been forty or fifty, for these are the only numerals commencing with the letter "F" that could have been in that space. And the word "hundred" following shows that the space must have been filled by a numeral qualifying "hundred." The word "four" opposite the name of "Rudolph Brand" has been made with the alteration of a previous word. With a glass of moderate power that can be readily seen.

Which was all the testimony offered by the United States.

The district attorney announced to the court that the case on behalf of the United States was closed.

Thereupon the defendants Mackin and Gallagher severally moved the court to instruct the jury to return a verdict of "not guilty" as to each of said defendants, upon the ground that there was no testimony in the case tending to show that either of said defendants were guilty of any offense whatsoever against the laws of the United States; also upon the ground that there was no testimony in this cause tending to show that either of said defendants was guilty of any offense, properly pleaded, set forth and charged in the information against them in this cause, or in any count thereof, whereof this court hath jurisdiction.

At the same time defendants Mackin and Gallagher severally moved the court to order that all the testimony given in this cause be stricken out, and that the jury be instructed that the case now stands as though no testimony had been given in this cause, upon the ground that no testimony had been introduced tending to establish that either of said defendants was guilty of any offense of which this honorable court had jurisdiction.

Second. On the ground that no testimony had been introduced in this cause tending to show that either of said defendants had committed any crime, misdemeanor, or offense whatsoever, against the laws of the United States.

125 Third. That there was no testimony in this cause tending to establish against either of said defendants any of the offenses wherewith they are charged in the information in this cause.

Fourth. Because no testimony whatsoever had been introduced in this cause tending, upon the issues joined, to maintain the case of the United States against either of said defendants, upon the information herein, nor upon any count thereof, sufficient in law.

After hearing argument of counsel upon said motion, the court adjourned.

FRIDAY, *February* 13, 1885.

Court met pursuant to adjournment, parties and jurors being present, and thie trial of this cause was resumed.

Court overruled both motions made on the day preceding, by the defendants Mackin and Gallagher, respectively, that the jury be instructed to return a verdict of "not guilty," and to strike out the testimony in this cause.

SATURDAY, *February* 14, 1885.

Court opened at ten o'clock a. m. and the trial of this cause was resumed.

The entire day was occupied in hearing testimony in behalf of the defendants.

MONDAY, *February* 16, 1885.

At 2 o'clock p. m., court reassembled, parties and jurors being present, and the trial of this cause was resumed.

When the court said: Some days ago, when the witnesses, Mr. Cool and Mr. Dawes, were on the stand, they were asked what Mr. Mackin said when he was before the grand jury, and the testimony was conditionally admitted subject to be ruled out; on examination and reflection, I am satisfied that the testimony should be excluded. The witness ought not to be required to state what was said by him as a witness before the grand jury.

Mr. TURNER (of counsel). The testimony went in and the jury heard it.

126 The COURT. It is stricken out now, and I will give the jury my reasons, in the charge, why it should be stricken out. The jury will understand that the testimony is excluded, and they are not to consider it in the case.

At a later day in the course of the trial the defendant Mackin was called as a witness in his own behalf, and on cross-examination was asked if, when before the grand jury, he did not refuse to testify as to what he did with the ballots printed for him by the Wrights because he did not want to criminate himself. Defendants' counsel objected to this question and the court sustained the objection, and read sec. 860, Rev. Stats. of U. S., and stated to counsel in the hearing of the jury that what Mackin had testified or refused to testify to before the grand jury could not be given in evidence against him on this trial.

TUESDAY, *February* 17, 1885.

Court opened at ten o'clock a. m., pursuant to adjournment, and the day was occupied in hearing testimony for the defendants, and in rebuttal.

Thereupon the testimony on both sides was closed, and the arguments of counsel having been heard on Saturday, February 21, 1885, the defendant Gallagher and the defendant Mackin each severally for himself prayed the court to instruct the jury as follows:

Thereupon the defendants Gallagher and Mackin prayed the Court as follows:

6. Even, if upon all the evidence in the case, you should be satisfied the defendants, or some two or more of them, did conspire together for the purpose of altering, mutilating, forging, and making away with election returns as charged, in order only to affect the election of senator in the Legislature of Illinois, and that this was the sole object of said conspiracy, then your verdict must be not guilty as to all the defendants.

7. This being a case depending largely upon circumstantial evidence, the court instructs you that the evidence must be such as to establish beyond all reasonable doubt, criminatory circumstances, inconsistent with any other reasonable theory than that the defendants, or some two
127 of them, are guilty of the precise crime charged. If there is any reasonable theory consistent with the facts proved, and also consistent with the innocence of the defendants, or any of them, then your verdict as to him or them must be not guilty. In other words, the facts proved must not only all be consistent with and point to the guilt of party

charged, but those facts must be inconsistent with his innocence, otherwise your verdict as to him must be not guilty.

8. The law clothes every defendant with the presumption of innocence which attends and protects him until it is overcome by testimony which proves his guilt beyond a reasonable doubt, which means that the evidence of his guilt, as charged, must be clear, positive and abiding, fully satisfying the minds and consciences of the jury. It is not sufficient, in a criminal case, to justify a verdict of guilty, that there may be strong suspicions, or even strong probabilities of guilt, nor as in civil cases, a preponderance of evidence in favor of the truth of the charge against defendant or defendants. What the law requires is proof by legal and credible evidence, of such a nature that when it is all considered by the jury, giving to it its natural effect, they feel, after having weighed and considered it all, a clear, undoubting, and entirely satisfactory conviction of the guilt of the accused. If as to any or all of the defendants there is less proof than this, then it is your duty to acquit him or them, as the case may be.

Each and every of which instructions so prayed by the defendants Gallagher and Mackin the court refused to give, to which refusal of the court to charge as prayed the defendants Gallagher and Mackin then and there severally excepted.

Which instructions, and each and every one of them, the court refused to give, save so far as they may be substantially embodied in the charge, to which ruling of the court defendant Gallagher and defendant Mackin severally excepted.

Thereupon the court proceeded to charge the jury as follows:

128 *Judge Blodgett's charge.*

Gentlemen of the Jury: This trial is upon an information filed by the district attorney as the prosecuting officer of this court, charging the defendants with having conspired together to commit an offense against the United States. Comment was made during the trial upon the fact that the defendants were not presented through the medium of an indictment by the grand jury. It is not necessary that they should be so. The law authorizes, in this class of offenses, the district attorney to file an information, and the defendants are as correctly put upon trial upon the charges in that information as though they were on trial on an indictment presented through the medium of the grand jury.

Comment was also made of affidavits attached to the information, that they were only upon information and belief. The only function or force of that affidavit was to guide the mind of the court upon the question of whether the case was sufficiently grave to authorize the order and issue of a bench warrant, and direct the amount of bail which should be indorsed upon that warrant to be given by the defendants; so that the question whether this case was properly brought before you is not a matter for your consideration at all. It is a matter of law, solely for the court.

The information contains seven counts, varying somewhat in the statement of the offense, but the body and gist of the offense as charged is briefly this: That on the 4th of November last an election was held in the Fourth Congressional district of this State for Representative to Congress,

and for Presidential electors, State officers, and some county officers; that the second voting precinct of the Eighteenth ward of the city of Chicago is situated in said Congressional district, and that polls were duly opened in said precinct at which votes were duly cast for Representative to Congress, together with the other officers to be voted for at said election; that after said election was closed the judges and clerks thereof duly counted the votes and ascertained and declared the result, and made the proper certificates of such result as to all the candidates voted for at such election
129 in said precinct, and inclosed the ballots cast at such election in an
envelope, which was properly sealed; and also enclosed in another envelope, which was properly sealed, the tally-sheets and one poll-book, with a certificate of the number of votes cast for each candidate in said precinct at said election, and the envelopes containing the poll-book and tally-sheets and ballots were duly delivered on the 5th of November, by one of the judges of the election in said precinct, to the county clerk of the county of Cook, and that it was the duty of the county clerk and of defendants Gleason and Biehl, who are deputy county clerks, to safely and securely keep said poll-books, tally-sheets and ballots, but that defendants Mackin, Gallagher, Gleason, and Biehl conspired together to alter and change, and did alter and change, the certificate as to the result of said election, so that the same should show that Rudolph Brand had received 474 votes for senator of the Sixth senatorial district of Illinois, and Henry W. Leman had received 220 votes for such senator, when in truth and in fact said Brand had only received 274 votes for such senator, and Leman had received 420 votes for such senator; and that they also conspired to remove, and did remove, from the envelope containing the ballots cast at said election in said second precinct 230 of said ballots, and did substitute 230 other spurious tickets or ballots in their place, which purported to be regular Republican tickets, except that they contained the name of Rudolph Brand as candidate for State senator in place of Leman.

A conspiracy is defined to be a confederation of two or more persons to commit an indictable offense. (2 Wharton, Criminal Law, section 1337.) Section 5440 of the Revised Statutes of the United States, under which this information was filed, provides as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner, or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty, etc.

You see, then, that in order to make a conspiracy under this act two or more persons must conspire together to commit an offense against the United States, or to defraud the United States. Either of them
130 makes an indictable conspiracy, and if one of them does any act to
effect the object of the conspiracy, then the conspiracy is complete as a crime, and the punishment must follow.

By section 5512, United States Revised Statutes, it is made an offense against the United States for any person who has any duty to perform in relation to an election of Representative to Congress, or in ascertaining the result thereof, or in giving any certificate or document in relation thereto, to knowingly violate any such duty, or do any act unauthorized by law relating to or affecting such election or the result thereof, and for any person to aid, counsel, procure, or advise any such violation of duty. Section 5511, Revised Statutes United States, makes it an offense against the United States for any person to knowingly interfere with an officer of election at which a Representative to Congress is elected, or by any unlawful means induce any officer of such election whose duty it is to ascertain, announce, or declare the result of such election or make any certificate, document, or evidence in relation thereto, to violate or refuse to comply with his duty or any law regulating the same, while section 5403 makes it an offense for any person to wilfully destroy any paper, document, or record deposited in any public office.

The statutes of Illinois impose upon the county clerk and upon his deputies the duty of safely keeping all the poll-books, tally-sheets, and ballots, delivered to them by the judges of election. The county clerk and his deputies were, therefore, persons having a duty to perform in regard to this election for Representative to Congress. So you will readily see tha tthe offense charged in this case is a conspiracy on the part of all these defendants to violate section 5512, by inducing defendants Biehl and Gleason, who had a duty to perform in regard to these evidences of the result of this election, to neglect to perform such duty, and by conspiring to aid, counsel, procure, or advise such officers to neglect their duty and thereby enable some person to spoliate and destroy the evidences of this election. Also to violate section 5511 by conspiring to induce the county clerk or the county returning board to make a false canvass and certificate of the result of said election; that is, by altering returns before the day of canvass came, to give the county clerk the means of making a false
131 return of the result of the election. Also to violate section 5403,
by conspiring to destroy a paper, to wit, the poll-book, tally-sheet, and ballots, which were properly deposited in the office of the county clerk. The office of such clerk being a public office, wherein such poll-books, tally-sheets, and ballots are properly deposited for the purpose of furnishing the proof authenticating the election of a member of Congress, and for that purpose the office of county clerk of this State is a public office of the United States.

When the certificates of the result of an election for a member of Congress, or any other office, for that matter, is altered in any material particular, such certificate is legally destroyed and is no longer evidence of what it originally stated. It is no longer the document which the judges and clerks signed, but it is a different document, and it makes a different statement. When the ballots which the judges of the election placed in the ballot-box as expressing the will of the voters as to their choice of candidates, voted for at the election, are destroyed or removed from the envelope in which the judges of election placed them, and other pieces of paper are put in the place of the ballots so removed or destroyed, those pieces of paper do not become ballots for any purpose, because they are not the ballots of the voters. The ticket becomes the ballot of the voter when the voter passes it in due course of the election to the judges of the election and the judges accept it as his ballot and deposit it in the ballot-box. And further, although the substituted paper may contain all the names but one which were upon the voters' ballot, and that one may not be the candidate for Congress, the original being gone, there is no mode by which it can be determined who the voters intended to vote for

or did vote for for Representative to Congress. It is charged that 230 ballots regularly cast at said election were destroyed or removed from the envelope in which they had been properly placed and sealed up, and that there were substituted in place of those so removed 230 other papers like those destroyed or removed, except that Brand's name for State senator was substituted for Leman's, and, as the proof tends to show, all these ballots were for George E. Adams for Representative for Congress. This fact affects the vote for Representative to Congress, because there is no
132 means of determining who those 230 voters voted for for Representative. They may not have voted for Adams at all, or only a part of them may have voted for him, and hence the removal of those ballots is an offense against the United States.

It is not my purpose to review or collate at length all the evidence bearing upon the charge against the defendants. The proof has been fully and exhaustively discussed by the counsel for the Government and the defense. It is a conceded fact that members of Congress were voted for at the second precinct of the Eighteenth ward on 4th of November last. It is also conceded that after the close of the polls the judges and clerks counted the votes cast, and found and declared that H. W. Leman had received 420 votes for State senator and Rudolph Brand had received 274 votes for the same office; and that they made the certificate declaring and certifying to such result, and a tally-sheet showing the count of the ballots for each candidate voted for and also certifying that George E. Adams received 425 votes for Representative to Congress and that John P. Altgeld had received 268 votes for the same office; that the poll-book with this count and the tally-sheet showing the same result were duly sealed up in an envelope. It is also conceded that the ballots cast at such election in said precinct were duly placed in an envelope and that the envelope was duly sealed. Whether the other poll-book was placed in the envelope with the ballots, or whether it was placed loosely in the ballot-box with these envelopes, is perhaps not conceded, nor does the proof make it quite clear; but is also conceded that the envelopes containing the poll-book and tally-sheet and the one containing the ballots were placed in the ballot-box, and the box sealed up by the judges of election. This ballot-box, thus sealed up, was taken to the Chicago avenue police station, just west of Clark street, by one or perhaps two of the judges at about 4.30 a. m. of the 5th of November, and left in care of the sergeant in charge of the station. It was called for by Shields, one of the judges, about 1 p. m. of the 5th of November, and by him delivered to Gleason at the office of the county clerk, the box being still sealed up.

It is conceded that Gleason and Biehl were deputy clerks of M. W. Ryan, the county clerk at that time; that Gleason and Biehl were two of
133 the four deputies who had the combination of the lock to the vault in which these returns and ballots were placed. At the proper time, seven days after the close of the election, Mr. Ryan, with two justices of the peace, proceeded to canvass the votes. On the 18th of November the second precinct of the Eighteenth ward was reached in this canvass, and it was then found that the returns made by the judges of election had been so altered as to read that Brand received 474 votes for State senator and Leman received only 220 votes for the same office. It is also conceded that the envelope containing the ballots was produced before the grand

jury of this court after the 21st of November last, and, on being opened, it was found that 230 ballots had been removed and 230 pieces of paper in the similitude of the regular Republican ticket, with the exception that Brand's name was substituted for Leman's, had been placed in the envelopes from which these ballots had been removed, and that these tickets all purported to be votes for Adams for Representative to Congress. I understood the defendants' attorneys in their arguments to admit that these 230 tickets were spurious, and not the ballots cast by the voters.

The Government testimony tends to show that directly after the discovery of the alteration of the returns at the time of the canvass by the county canvassing board, the matter was brought to the attention of the grand jury of this court, then in session, and on the 21st of November a subpœna issued, directing the county clerk, Ryan, to bring the returns, poll-books, ballots, etc., appertaining to the election in the second precinct of the Eighteenth ward of the city of Chicago before this grand jury as testimony.

The Government testimony also tends to show that on the 21st day of November, between 1 and 3 p. m., defendant Mackin applied to S. B. Wright, of the P. L. Hanscom Printing Company, to print a ticket in the similitude of the regular Republican ticket used in the last election, and that in pursuance of this application a ticket was engraved and printed as nearly in exact imitation of the copy presented by Mackin as the material obtainable would admit, and that 2,000 such tickets were delivered to Mackin on the evening of the 21st.

134 The Government proof further tends to show that the 230 tickets found in the envelope in the place of the 230 missing ballots were part of those printed at Hanscom's on the afternoon and evening of the 21st, and delivered that evening to Mackin.

The Government proof further tends to show that on the opening of the envelope containing the ballots before the grand jury these 230 tickets were found strung consecutively upon the string bearing the ballots, having been recently folded, and were clean and bearing the appearance of their having been hastily folded; that all these tickets had pencil-mark numbers in figures upon their backs corresponding to the names of voters on the poll-book. The proof also tends to show that in the same envelope with the ballots was what purported to be one of the poll-books of said election, but the certificate containing the names of candidates and number of votes cast for each bears no evidence of alteration, but it is fully written out in the certificate that Brand received 474 votes for State senator and Leman received 220 for the same office. Instead of being altered by erasure, like the poll-book before the county canvassing board, this poll-book in the envelope has the appearance of an original paper, in which it was originally written and certified that Brand had received 474 votes and Leman only 220. The Government has given proof tending to show that the tally-sheet before the county canvassing board, and which was with the altered poll-book, and the certificate upon the poll book found in the envelope with the ballots, and the figures on the back of the spurious tickets are forged, and all in the handwriting of defendant W. J. Gallagher.

The Government has also given evidence tending to show that defendants Gleason and Biehl, leaving the means of access to the vault where the returns and ballots were kept, in some way gave opportunity to whoever removed said ballots from the envelope, and whoever saw fit to alter or change those poll-books and forge this tally-sheet, to do and perform said acts. It is not contended, so far as I understand the prosecution, that either Gleason or Biehl altered the poll-book or forged the tally-sheet, or that they forged the poll-book or any part of it found in the envelope with the ballots.

This is the substance of the Government's proof.

135 The defendants deny all the inculpating facts. Mackin denies that he ordered or received from the Wrights the tickets in question. He denies that he presented to Wright, or at the printing office of the P. L. Hanscom Printing Company, a regular Republican ticket at any time after the election and requested or procured them to print a copy or imitation of it. Gallagher denies that he made or had anything to do with the alteration or forging of the poll-books and tally-sheet, and produces witnesses who testify that they know his handwriting, and that these papers alleged to be forged were not written by him. Biehl and Gleason deny all combination or co-operation with Mackin and Gallagher to commit any crime, while admitting that they have to some extent prevaricated, or, at least, the defendant Gleason admits that he has prevaricated and told different stories at different times in regard to the manner in which he took charge of these ballots.

The case centers mainly around the question of fact whether Mackin ordered the spurious tickets found in the envelope containing the ballots, and whether the P. L. Hanscom Company printed them on his order. The Government witnesses to support the allegation that Mackin did so order them are, first, J. S. Thompson, S. B. Wright, W. H. Wright, and Max Fries, who all testify that they were in the office; that Mackin was there, and that they heard the order given by him for the tickets, and that Thompson took the head of the ticket and carried it to Fallis, the engraver at the office of Baker & Co., and directed Fallis to engrave it as rapidly as possible, as the job was in a hurry. You have then the testimony of Beers, that in the evening he, being the pressman at this printing house, printed the tickets in question. Fallis identifies the head of the ticket as having been engraved by him. The Wrights identify the tickets found in the box as the tickets printed by them. Tucker identifies the engraving as having been partly made by himself.

On the other side, you have Mackin's unequivocal denial, and some testimony tending to show that a ticket like the regular Republican ticket, except that Brand's name appeared as a candidate for State senator instead of Leman's, was in circulation on election day about the polling-
136 places in that Senatorial district, and some testimony in regard to the printing of a ticket in exact imitation of the spurious ticket on the night before the election, which I will mention further on.

The question of fact then is, are you satisfied beyond reasonable doubt that the 230 spurious tickets found in this ballot envelope, when opened before the United States grand jury, were ordered by Mackin and printed for him by the Wrights on the 21st of November last. One way to test this is to ask yourselves, would the proof by Thompson, the two Wrights, Fries, Beers, Fallis, and Tucker that these tickets were ordered by and printed for Mackin, satisfy you beyond reasonable doubt if that fact was uncontradicted? And if you would be so satisfied upon such proof, does the contradiction of this testimony by Mackin and the other testimony he has offered under these circumstances destroy the conviction in your minds which the Government proof would produce if uncontradicted.

Mackin is called as a witness in his own behalf. Although the law allows a defendant in a criminal case to testify in his own behalf, it leaves his credibility wholly to the jury. You can readily see the almost overwhelming interest Mackin and the other defendants have in the result of this case, and are to judge for yourselves how far that interest should affect their credibility. You have the right to believe them, and you have the right to entirely reject their testimony and disbelieve them, if, in your judgment, they have not testified to the truth.

There has been considerable proof offered by defendants tending to show the possibility of electrotyping or stereotyping, or producing by some of the known processes of the art, a fac simile or counterpart of the Republican ticket in a very short time, and hence tending to show that there might have been exact counterparts of the regular Republican ticket in existence about the polls on election day; or that some other persons than Mackin or either of these defendants might have made or caused to be made the spurious tickets found in this envelope. The proof on the part of the Government, however, tends to show that the tickets printed by the Wrights and found in the envelope with the ballots, are not exact counterparts of the regular Republican tickets; that there are 137 easily distinguished differences in the engraved heading; that the type is different, and such as an experienced printer will readily detect. The Wrights say they made the ticket as nearly like the copy given them by Mackin as the type they could obtain would allow, but that some of the type in the ticket was from different fonts than the type from which the regular ticket was printed.

You will remember the testimony of Mr. Stone as to the difference in the styles of types used in the two tickets, and the testimony of Mr. Fallis as to the differences in the engraved head, and testimony of Tucker to the same point. The testimony of these electrotypers tends to show that an electrotype or stereotype would be an exact counterpart of the ticket from which it was taken. It would not display different kinds of type from the original any more than a copy of a photograph would be different from the original photograph. So that, if you believe the testimony of Stone and the other experts who have testified as to the identity of the 230 tickets found in this ballot envelope with those printed by the Wrights, and the differences between those tickets and the regular Republican ticket, it makes very little difference for the purposes of this case how soon after the regular Republican ticket was out on election day a counterfeit could have been produced, because the tickets printed by the Wrights are not exact counterfeits of the regular Republican ticket, if you believe the testimony of the Government.

Proof was also offered in behalf of defendants by the witnesses Titman, Sullivan, Gilmore, and Simons tending to show that a ticket exactly like the ticket which it is claimed was printed on the 21st of November by the Wrights, on the order of Mackin, was printed by Sullivan in Titman's printing office on the night of November 3d, and put in circulation on election morning in the Sixth senatorial district. These witnesses in

their first examination did not, as I now remember their testimony, agree in many important particulars. Titman stated that he left Sullivan at his printing office at the time he (Titman) quit work in the evening at six o'clock, and that his engineer was there to run the engine, that Sullivan might do the printing. Sullivan said that Gilmore took home the stereotype plate or form about eleven o'clock on the night of the 3d.
138 Gilmore said he got the form or plate from the man called "Johnny" in Chapin & Gore's alley, about twelve o'clock noon of the 3d and gave it to Sullivan very soon after, near the corner of State and Monroe streets. Gilmore also said he was paid by Simons the $20 he paid "Johnny" for the form and the $20 he paid Sullivan for the printing, while Simons said he paid Gilmore no money at all for these tickets.

The testimony of Jeffery, on the part of the Government, tends to show that the form on which the regular Republican ticket for the city was printed was not made up till after nine o'clock the night of the 3d, which is wholly inconsistent with Gilmore's story as to the time when he got the form or plate from "Johnny," as he explained. Sullivan also produced, not a copy of the original Republican ticket, but a ticket, as I have said, exactly like the spurious tickets found in the envelope, which, it is claimed by the Government, Wright printed at Mackin's order; and it becomes a pertinent inquiry whether it is probable that a ticket could have been or was produced at Jeffery's or anywhere else on the night of the 3d of November which bears all the peculiar marks which characterize the tickets claimed to have been printed by the Wrights on the 21st.

When I state my recollection as to the testimony of these witnesses, or any others, you must understand that it is only my recollection, and if your memory differs from mine you are to be guided by your own memory and not by mine.

After these witnesses had so testified, the witness Sullivan was arrested for perjury in this case, and he again came into court and testified that his entire statement as to the printing of the tickets on the night of November 3d was false; that he printed no tickets on that night or at any other time like the regular Republican ticket, and Titman testified that he did not rent his office to this witness, Sullivan, on the night of the 3d, and that so far as he knew no tickets were printed at his office; that no coal or paper was used there, and there was no evidence in the office the next morning that any printing had been done there.

The testimony of Sullivan and Titman also tended to show that they
had visited defendant Mackin, at his room in the Palmer House,
139 and had been furnished by him with samples of the ticket they
were to swear was printed by Sullivan, and that Mackin and Gallagher were fully cognizant of the falsity of their testimony. It is denied by counsel for Gallagher that any of the testimony implicates Gallagher with this said-to-be fabricated testimony. I leave that to your memory.

Under these circumstances you are to say not only whether this testimony, as originally presented, was worthy of credence, but also, if you are satisfied it was false and fabricated, whether the defendants Mackin and Gallagher, or either of them, presented it to the court knowing it to be false and fabricated. If a party to a suit knowingly destroys or suppresses testimony, the law raises the presumption that if produced it would be against him. If a defendant in a criminal prosecution, instead of standing upon the presumptions of innocence which the law holds about him, see fit to fabricate testimony, it is for you to say whether such an act is evidence of guilt or not.

If you are satisfied from the proof that the defendants Mackin and Gallagher, or either of them, have presented this testimony of Sullivan and his pretended associates to you, knowing that it was false and fabricated, it is for you to say what effect such conduct shall have upon his case, and his own credibility as a witness before you. You must say whether you will place confidence in the testimony of a man who has knowingly placed before you perjured testimony and attempted to influence your verdict by it.

In the light of this testimony it is then for you to say whether you are or are not satisfied beyond reasonable doubt that the spurious tickets found in the ballot envelope were printed by the Wrights on the afternoon and evening of the 21st of November last, on the order or at the instance of the defendant Mackin. In other words, does the denial by Mackin, as a witness in his own behalf, that he ordered these tickets and received them from the Wrights in pursuance of such order, together with the other testimony adduced by defendants, overcome the testimony of the prosecution in that regard? This is a question of fact which you, and you alone, must pass upon.

140 As I have already said, the testimony shows without dispute, that there were two poll-books kept at the election; that when the counting of the votes was finished one poll-book and the tally-sheets were placed in one envelope and the ballots and affidavits were placed in the other envelope. When the ballot envelope was produced by the county clerk and before the grand jury of this court and opened there, it contained what purports to be a poll-book; but it is insisted by the prosecution that this is not the poll-book used at the election, but it is a forged one, or, at least, that all of the certificates stating the number of votes cast for each candidate are forged, and proof has been offered tending to show that this is in Gallagher's handwriting.

It must, I think, be conceded that the altered poll-book and the tally-sheet which were before the county canvassing board were changed between the time the count was concluded by the judges and the clerks of the election and the 18th of November, when the alteration was discovered by the county canvassing board. When, if ever, the poll-book found in the envelope with the ballots was forged, if at all, we do not learn from the proof. It may have been forged at the time the ballots were changed. It may have been forged at some other time, if it has been forged at all. The theory of the prosecution is that it was done at the same time the ballots were removed and the spurious tickets substituted. It appears from the proof that one Michael Sullivan was one of the clerks of the election in this precinct, and it also appears that he has left this part of the country. Where he has gone or why he has gone does not appear, but the suggestion is made by defendants' counsel that these changes in poll-book No. 1 and the forged tally-sheet were made by him. This is only a suggestion. No proof of his guilt is adduced. For aught we know he may have left for legitimate purposes.

The proof also tends to show that the altered poll-book is, part of it, in

the handwriting of this man Michael Sullivan, and that paper being in the case you have the right to compare the handwriting shown to be his with that of the tally-sheet, the other poll-book or portions of it alleged to be
forged, and say for yourselves, so far as such comparison and ex-
141 amination will enable you to do so, whether it is probable that the
alterations or alleged forgeries were made by this man Sullivan or not.

The testimony against the defendant Gallagher is mainly that of persons who have seen him write or know his handwriting, and that of certain experts in handwriting, to the effect that they are of opinion that the tally-sheet and the certificate to the poll-book found in the envelope with the ballots when this envelope was opened before the grand jury of this court, are in the handwriting of Gallagher.

This testimony is competent—that is, it is proper to be heard and considered in the case, but its force and conclusiveness are wholly to be weighed and determined by you. Like any other fact in the case, you are to be satisfied in regard to it beyond a reasonable doubt.

You have no right to convict the defendant Gallagher of the forgery of this paper unless the proof adduced by the prosecution satisfies you beyond a reasonable doubt that he did forge the paper. Anything else than this entitles him to an acquittal.

As before stated, the testimony against the defendants Gleason and Biehl tends to show that they, or one of them, gave opportunity to whoever withdrew these missing ballots from the envelope and placed the spurious tickets therein to perpetrate this act, and also that they in some way gave opportunity to another or others to destroy the original tally-sheet and change one poll-book and forge portions of the other. This testimony consists mainly of contradictory and prevaricating statements made by Gleason while a witness before the grand jury of this court, as to where the packages containing these ballots and tally-sheets were kept while in the county clerk's office, and, as to Biehl, the testimony of Gleason that he gave the combination of the vault lock to Dwyer, another clerk in the office, on the 22d of November.

It is urged on behalf of both these defendants that all they are shown to have done is consistent with their entire innocence; that these acts cannot be made criminal or treated as criminal acts unless they were done with a criminal intent; and this position is undoubtedly a sound one. You must be satisfied from the proof that if these men did so conduct
themselves as deputy county clerks in charge of this vault and these
142 papers, that it gave opportunity for other persons to spoliate the
papers, destroy the ballots, forge the returns, yet if they did not do it for the purpose of enabling them to do so, they are not guilty, because the act in itself has no form of guilt, and at most is mere negligence; that they and each of them might have done all that the proof shows they did, and yet not had any guilty purpose in so doing. It is your duty to give them the benefit of every reasonable doubt on this point, and if you can see that *that* they might innocently, and consistently with their duty, have done all that the proof shows they did, or if the proof leaves you in real doubt as to their guilt, then you should acquit them.

A conspiracy to commit a crime can rarely be proven by direct evidence. It is rare, except when one of the conspirators has turned informer, that the prosecution is able to produce direct evidence that two or more persons actually came together and agreed to commit a given crime.

Nor is it necessary that the conspiracy should be proven by direct evidence. If the circumstances in proof satisfy you that these men, or any two of them, were working with a common purpose to commit the offense charged in any of the forms alleged in the counts of this information, then you have the right to infer that there was a confederation or common understanding to commit the offense. But you must be satisfied from the proof, and that, too, beyond a doubt, that this common understanding or purpose existed between two or more of the defendants, or between one of the defendants named and some person as yet unknown.

If you are satisfied from the proof that the offense here charged was committed by the co-operation of two or more of these defendants, or of one of them and some other person as yet unknown, then you should find such defendants or defendant guilty.

If, for instance, you are satisfied from the proof that Mackin procured the printing of the spurious tickets found in the envelope with the ballots, and that one of the defendants, Gallagher, for instance, removed the genuine ballots from that envelope and substituted these spurious ones in their place, then you should find such defendants guilty.

143 If the proof does not satisfy you that Gallagher forged the tally-sheet, altered and forged the poll-books, as alleged, nor that Gleason or Biehl did so, but that some other person unknown to you and unknown to the Government co-operated with Mackin to commit this offense, then you should find Mackin guilty; that is, you can find either of the defendants guilty of conspiring with some unknown person, or you can find any two of the defendants named guilty of conspiring together to commit the crime and acquit the others.

In all criminal prosecutions of this nature the Government has the burden of proof. The presumption of innocence attends the defendants until that presumption is fully removed by the proof. If you have a reasonable doubt as to the guilt of either defendant, or of all of them, then your verdict should be in favor of those as to whom you are in such doubt.

The question is: Can you reasonably reconcile the proven facts in this case with any other theory than that of the guilt of these defendants, or some one or more of them? If you can do so then you can truthfully say that you have a reasonable doubt; but if you cannot do so, then you cannot say you have such reasonable doubt. A reasonable doubt is a doubt which springs from a consideration of all the testimony in the light of reason, a doubt which makes it unreasonable to believe the defendant guilty. Is it reasonable to assume that Thompson, S. B. Wright, W. H. Wright, and Fries have deliberately sworn falsely as to the fact that Mackin ordered these spurious tickets found in the ballot envelope, and that such tickets were printed and delivered to Mackin? Is it reasonable to assume that this P. L. Hanscom Printing Company would have caused the head of this spurious ticket to be engraved and the tickets printed, as the testimony of Fallis, Tucker, and Beers tends to prove they did, over two weeks after the election unless some one employed them to do it? And would those spurious tickets have been ordered at that late day, over two weeks after election had passed, for any honest purpose? If there was a conspiracy

to remove the genuine ballots or any of them from this envelope, and substitute spurious ones in their place, so as to make the contents
144 of the ballot envelope verify the changed poll-book and tally-sheet,
would it not have been natural to have ordered these tickets through Mackin, as he had been for years in the habit of ordering tickets, and had such *such* relations with this printing-house as offered some guaranty, at least, that the secret should be kept?

These are questions which naturally suggest themselves from the testimony, and the answer is to be made by you through your verdict. The law makes you the sole judges of the credibility and weight of all the testimony, and the court has no control or voice in it. It is for you to weigh each circumstance in the proof, and to weigh the combination of circumstances—to weigh and consider the credibility of the witnesses, and say who you will believe or how far you will disbelieve any or all.

A single circumstance standing alone may have little weight. It is the relation it bears to other facts and circumstances, and the degree in which it leads or confirms the mind in a given conclusion, which entitles it to weight. For illustration, the relations between Mackin and Gallagher were disclosed in the testimony. It has been shown that they were friends; that they were frequently together, particularly during the time the canvass was going on, in the county clerk's office. The mere fact that Gallagher and Mackin were seen often together at about the time the United States grand jury began their investigation of this fraud; that Gallagher had had considerable experience as a judge of election, and knew how to make out returns and tally-sheets, and might be called an expert election official, would, under ordinary circumstances, excite, perhaps, no suspicion; but if this testimony tends in your minds to show that he had the qualification to enable him to effect this change in these poll-books and tally-sheets, it is for you to say what force should be given these circumstances. If Mackin had determined to have these poll-books altered and tally-sheets forged, and, when the danger of exposure became imminent, to have the ballots tampered with, he would naturally have chosen as his confederate some tried friend. He would hardly have taken a stranger.

In considering this case you are to purge your minds of all prejudices and previously formed opinions, if you had them, and pass upon the case solely in the light of the proof from the witness stand. It is con-
145 ceded that a great crime has been committed, a crime in compari-
son with which armed and open treason becomes a trivial offense. For of what value to himself or country is a freeman's suffrage, his voice at the polls, if the word of his utterance can be destroyed with impunity?

The question before you is, did these defendants, or any of them, commit this crime? Does the proof, beyond reasonable doubt, show that they, or any of them, are guilty? If it does, you should unhesitatingly say so by your verdict. If it does not, you should as promptly and gladly acquit them.

I am asked in behalf of defendant Gallagher to say there is no proof in the case that he is now under indictment in Philadelphia for forgery. I can only say that no documentary proof to that effect has been offered. If there was any oral evidence or admission of that kind in the cross-examination of this defendant, my notes fail to show it and my memory does not serve me. You will, therefore, rely upon your own memories as to whether he made any such admission or not. There is no such evidence in this case, unless it came out on his cross-examination.

The form of your verdict will simply be:

We, the jury, find the defendants guilty or not guilty. You can find as I have already stated, one defendant guilty of conspiring with persons unknown. You can find two defendants guilty and acquit the others. You can find one of the defendants guilty of conspiracy with persons unknown, and acquit the other three.

In regard to the first three counts, the court said the jury must find that the conspiracy was with some person in the county clerk's office who had a duty to perform in connection with the election, if they found any one guilty on those counts.

(Endorsed:) Filed Feb'y 21, 1885. Wm. H. Bradley, clerk.

The defendant Gallagher and defendant Mackin severally excepted to so much of said charge as is as follows:

The defendants Gallagher and Mackin then and there excepted to so much of said charge of the court as is as follows:

146 The statutes of Illinois impose upon the county clerk and upon his deputies the duty of safely keeping all the poll-books, tally-sheets, and ballots delivered to them by the judges of election. The county clerk and his deputies were, therefore, persons having a duty to perform in regard to this election for Representative to Congress. So you will readily see that the offense charged in this case is a conspiracy on the part of all these defendants to violate section 5512, by inducing defendants Biehl and Gleason, who had a duty to perform in regard to these evidences of the result of this election, to neglect to perform such duty, and by conspiring to aid, counsel, procure, or advise such officers to neglect their duty and thereby enable some person to spoliate and destroy the evidences of this election. Also to violate section 5511 by conspiring to induce the county clerk or the county returning board to make a false canvass and certificate of the result of said election; that is, by altering returns before the day of canvass came, to give the county clerk the means of making a false return of the result of the election. Also to violate section 5403, by conspiring to destroy a paper, to wit, the poll-book, tally-sheet, and ballots, which were properly deposited in the office of the county clerk. The office of such clerk, being a public office, wherein such poll-books, tally-sheets, and ballots are properly deposited for the purpose of furnishing the proof authenticating the election of a member of Congress, and for that purpose the office of county clerk of this State is a public office of the United States.

Said defendants Gallagher and Mackin then and there also excepted to so much of said charge of the court as is as follows:

When the certificates of the result of an election for a member of Congresss, or any other office, for that matter, is altered in any material particular, such certificate is legally destroyed, and is no longer evidence of what it originally stated. It is no longer the document which the judges and clerks signed, but it is a different document, and it makes a different statement. When the ballots which the judges of the election placed in the ballot-box as expressing the will of the voters as to their choice
147 of candidates voted for at the election are destroyed or removed from the envelope in which the judges of election placed them, and

other pieces of paper are put in the place of the ballots so removed or destroyed, those pieces of paper do not become ballots for any purpose, because they are not the ballots of the voters. The ticket becomes the ballot of the voter when the voter passes it in due course of the election to the judges of the election and the judges accept it as his ballot, and deposit it in the ballot box. And further, although the substituted paper may contain all the names but one which were upon the voter's ballot, and that one may not be the candidate for Congress, the original being gone, there is no mode by which it can be determined who the voters intended to vote for, or did vote for, for Representative to Congress. It is charged that 230 ballots regularly cast at said election were destroyed, or removed from the envelope in which they had been properly placed and sealed up, and that there were substituted, in place of those so removed, 230 other papers like those destroyed or removed, except that Brand's name for State senator was substituted for Leman's, and, as the proof tends to show, all these ballots were for George E. Adams for Representative for Congress. This fact affects the vote for Representative to Congress, because there is no means of determining who those 230 voters voted for for Representative. They may not have voted for Adams at all, or only a part of them may have voted for him, and hence the removal of those ballots is an offense against the United States.

Said defendants Gallagher and Mackin then and there severally excepted to so much of said charge as is as follows:

The case centers mainly around the question of fact, whether Mackin ordered the spurious tickets found in the envelope containing the ballots, and whether the P. L. Hanscom Co. printed them on his order. The Government witnesses to support the allegation that Mackin did so order them are, first, J. S. Thompson, S. B. Wright, W. H. Wright, and Max Fries, who all testify that they were in the office; that Mackin was there, and that they heard the order given by him for the tickets, and
148 that Thompson took the head of the ticket and carried it to Fallis,
the engraver, at the office of Baker & Co., and directed Fallis to engrave it as rapidly as possible, as the job was in a hurry. You have then the testimony of Beers, that in the evening he, being the pressman at this printing house, printed the tickets in question. Fallis identifies the head of the ticket as having been engraved by him. The Wrights identify the tickets found in the box as the tickets printed by them. Tucker identifies the engraving as having been partly made by himself.

On the other side you have Mackin's unequivocal denial and some testimony tending to show that a ticket like the regular Republican ticket, except that Brand's name appeared as a candidate for State senator in place of Leman's, was in circulation on election day about the polling places in that senatorial district, and some testimony in regard to the printing of a ticket in exact imitation of the spurious ticket on the night before the election, which I will mention further on.

The question of fact, then, is, are you satisfied beyond reasonable doubt that the 230 spurious tickets found in this ballot envelope, when opened before the United States grand jury, were ordered by Mackin and printed for him by the Wrights on the 21st of November last?

Defendant Gallagher then and there excepted to so much of said charge as is as follows:

The testimony of Sullivan and Titman also tended to show that they had visited defendant Mackin at his room in the Palmer House, and had been furnished by him with samples of the ticket they were to swear was printed by Sullivan, and that Mackin and Gallagher were fully cognizant of the falsity of their testimony. It is denied by counsel for Gallagher that any of the testimony implicates Gallagher with this said-to-be fabricated testimony. I leave that to your memory.

Foreasmuch, therefore, as the matters and things hereinbefore set forth do not fully appear of record in the above entitled cause, the defendant William J. Gallagher and defendant Joseph C. Mackin, respectively, present to this honorable court this bill of exceptions, and pray that
149 the same may be signed and sealed and ordered to become and be a part of the record in this cause. Which is accordingly done.

H. W. BLODGETT,
United States District Judge, Northern District of Illinois.

(Endorsed:) Filed M'ch 12, 1885. Wm. H. Bradley, clerk.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the district court of the United States for the northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings had in said court in the cause wherein the United States of America is the plaintiff and Joseph C. Mackin, William J. Gallagher, et al. are the defendants, as the same appear from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said district, this twenty-first day of March, 1885.

[SEAL.] WM. H. BRADLEY, *Clerk.*

(Endorsed:) Filed Mar. 24, 1885. Wm. H. Bradley, clerk.

150 On the same day, to wit, on the twenty-fourth day of March, in the adjourned March term of said court, 1885, in the record of the proceedings thereof in said entitled cause before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

JOSEPH C. MACKIN AND WILLIAM J. GALLAGHER, plaintiffs in error,
vs.
THE UNITED STATES OF AMERICA, DEFENDants in error.
} Writ of error to district court.

On this day here come in person the said Joseph C. Mackin and Michael C. McDonald, Dennis Kavanaugh, and John W. Crawford and acknowledge themselves jointly and severally to owe and be indebted to the said United States of America in the sum of fifty thousand dollars, lawful money of the United States, to be levied of their several and respective goods and chattels, land and tenements, rights, credits, and effects; yet upon the condition that if the said Joseph C. Mackin shall personally be and appear before this court on the first day of the next term thereof, to be held on the first Monday of May next at the United States courthouse in Chicago, and from day to day during that and subsequent terms,

and shall abide the order and judgment of the court in this behalf
151 and not depart without leave of the court, then this recognizance shall
be void and otherwise shall remain in full force and effect, and with this the said Joseph C. Mackin, Michael C. McDonald, Dennis Kavanaugh, and John W. Crawford say they are content.

On the same day, to wit, on the twenty-fourth day of March, in the adjourned March term of said court, 1885, in the record of the proceedings thereof in said entitled cause before Hon. Walter Q Gresham, circuit judge, is the following entry, to wit:

JOSEPH C. MACKIN AND WILLIAM J. GALLAGHER, plaintiffs in error,
vs.
THE UNITED STATES OF AMERICA, DEFENDANTS in error.
} Writ of error, district court.

On this day, here come in person the said William J. Gallagher and Michael C. McDonald, Dennis Kavanaugh, and John W. Crawford and acknowledge themselves to owe and be indebted to the said United States of America in the sum of fifty thousand dollars to be levied of their respective goods and chattels, lands and tenements, rights, credits, and effects; yet upon the condition that if the said William J. Gallagher shall
personally be and appear before this court on the first day of the
152 next term thereof, to be held on the first Monday of May next at
the United States court-house in Chicago, and from day to day during that and subsequent terms, and shall abide the order and judgment of the court in this behalf and not depart without leave of the court, then this recognizance shall be void and otherwise shall remain in full force and effect, and with this the said William J. Gallagher, Michael C. McDonald, Dennis Kavanaugh, and John W. Crawford say they are content.

Afterwards, to wit, on the sixth day of May, 1885, came Emery A. Storrs and filed in said clerk's office his appearance as counsel for Joseph C. Mackin in said entitled cause, which said appearance is in the words and figures following, to wit:

Appearance.

DISTRICT COURT OF THE UNITED STATES,
Northern District of Illinois:

THE UNITED STATES OF AMERICA
vs.
JOSEPH C. MACKIN, IMPLEADED with Henry Biehl and Arthur Gleason.
} Indictment.

To. WM. H. BRADLEY, Esq.,
Clerk U. S. Dist. Court, Northern Dist. Ills.:

Please enter my appearance as attorney for the above named de-
153 fendant Joseph C. Mackin in the above entitled cause.

Yours, &c.,

EMERY A. STORPS.

CHICAGO, *May* 6, '85.

(Endorsed:) Filed May 6, 1885. Wm. H. Bradley, clerk.

154 Afterwards, to wit, on the eighteenth day of May, in the adjourned May term of said court, 1885, in the record of the proceedings thereof in said entitled cause before Hon John M. Harlan, one of the justices of the Supreme Court of the United States, and Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

JOSEPH C. MACKIN AND WILLIAM J. Gallagher, plaintiffs in error, *vs.* THE UNITED STATES OF AMERICA, defendants in error.	Writ of error to district court.

Now come the plaintiffs in error, Joseph C. Mackin and William J. Gallagher, by Emery A. Storrs, esq., and Henry W. Thomson, esq., their attorneys, and now come also the defendants in error The United States of America, by the district attorney and I. N. Stiles and J. B. Hawley, and now comes on to be heard the writ of error issued herein and the return thereto, and after hearing a part of the arguments of the respective counsel, the hour of adjournment having arrived, it is ordered that the further hearing of said writ be postponed until to-morrow morning.

155 Afterwards, to wit, on the nineteenth day of May, in the adjourned May term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. John M. Harlan, one of the justices of the Supreme Court of the United States, and Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

JOSEPH C. MACKIN AND WILLIAM J. GALLAGHER, plaintiffs in error, *vs.* THE UNITED STATES OF AMERICA, DEFENDANTS in error.	Writ of error to district court.

Now come again the plaintiffs in error, Joseph C. Mackin and William J. Gallagher, by Emery A. Storrs, esq., and Henry W. Thomson, esq., their attorneys, and the defendants in error, The United States of America, by their said attorneys; and now comes on further to be heard the writ of error issued herein, and the return thereto, and after hearing the concluding arguments of the respective counsel thereon, the court not being now sufficiently advised in the premises takes the same under advisement.

156 Afterwards, to wit, on the twenty-first day of May, in the adjourned May term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. John M. Harlan, one of the justices of the Supreme Court of the United States, and Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

JOSEPH C. MACKIN AND WILLIAM J. GALLAGHER, plaintiffs in error,
vs.
THE UNITED STATES OF AMERICA, defendants in error.
} Error to district court.

Now come again the said plaintiffs in error, Joseph C. Mackin and William J. Gallagher, in person and by their said attorneys, and now come also the said defendants in error, by their said attorneys, and this cause having heretofore been heard upon the transcript of the record of the district court, and argued by the counsel of the plaintiffs in error and the counsel of the defendants in error, and the same having been considered by the court the court now announce that they are divided in opinion upon the questions arising in the trial of this cause, and it is ordered that further proceedings herein be postponed until to-morrow morning.

157 Afterwards, to wit, on the twenty-second day of May, in the adjourned May term of said court, 1885, in the record of the proceedings thereof in said entitled cause before Hon. John M. Harlan, one of the Justices of the Supreme Court of the United States, and Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

JOSEPH C. MACKIN AND WILLIAM J. GALLAGHER, plaintiffs in error,
vs.
THE UNITED STATES OF AMERICA, defendants in error.
} Error to district court.

And now on this day here again come as well the said Joseph C. Mackin and William J. Gallagher, plaintiffs in error, in person, and by their respective counsel aforesaid, as the district attorney and the other counsel aforesaid, on the part of the said United States, and the judges having announced that they are divided in opinion upon questions arising on the trial of this cause, the district attorney, on the part of the
said United States, and the said plaintiffs in error, by their re-
158 spective counsel aforesaid, thereupon request the judges to certify
to the Supreme Court of the United States the questions upon which they are so divided in opinion; and accordingly the judges make and caused to be filed herein the following certificate, to wit:

Be it remembered that this cause came on for trial in the circuit court of the United States for the northern district of Illinois upon writ of error to the district court of the United States for the same district, before the circuit justice and circuit judge, and on the trial thereof the following questions occurred, upon which the judges were divided in opinion, to wit:

1. Whether the crimes, or any of them, charged against the defendants in the counts of the information are infamous crimes within the meaning of the 5th article of amendment to the Constitution of the United States.

2. Whether the defendants can or not be held to answer in the courts of the United States for the crimes charged, or any of them, against them
herein, otherwise than on the presentment or indictment of a
159 grand jury.

3. Are the papers, records, returns, poll-books, ballots, tally-

lists, certificates or other papers described in the sixth and seventh counts of the information, records, papers, proceedings, or documents such as are embraced by or are described in section 5403 of the Revised Statutes of the United States, and is the county clerk's office of Cook County, Illinois, a public office, and such clerk a public officer within the meaning of that section, and with reference to the laws of the United States and of the State of Illinois upon the subject of elections?

4. Do the facts stated in the 1st, 2d, or 3d counts of the information constitute a conspiracy to commit an offense against the United States under section 5512 of the Revised Statutes?

5. Do the facts stated in the 4th and 5th counts of the information constitute a conspiracy to commit an offense against the United States under section 5511 of the Revised Statute?

160 The district attorney for the United States, and the defendants by their counsel, having requested the court to certify the several before-mentioned points upon which the judges were divided in opinion this certificate is given in conformity with such request; and the clerk of this court is directed to forward a transcript of the record and the points herein, certified under the seal of this court, to the Supreme Court of the United States at its next session.

JOHN M. HARLAN,
Circuit Justice.
WALTER Q. GRESHAM,
Circuit Judge.

Filed May 22, 1885.

WM. H. BRADLEY,
Clerk.

And the court being of opinion that further proceedings are not to be had herein without prejudice to the merits of this cause until the decision of the said questions by the said Supreme Court; it is therefore ordered that further trial of this cause be stayed until this court shall make order concerning the same; and it is further ordered that the said plaintiffs in error give recognizance of bail in this behalf, respectively, in the sum of fifty thousand dollars each, with sufficient sureties.

161 And thereupon there is filed herein a stipulation and agreement in writing, which is as follows (after entitling the court and cause), that is to say:

Upon the hearing of this cause, the judges being divided in opinion upon certain matters, and having at the request of the plaintiffs in error certified to the Supreme Court the points upon which there is such disagreement, now it is stipulated and agreed by the respective counsel that this cause may be advanced in the Supreme Court and heard on the second day of the next term thereof (or as soon thereafter as may be), and that all arguments shall be filed with the clerk of that court in time for a hearing on that day, the U. S. attorney, however, stipulating and agreeing, subject to the approval of the Attorney-General.

EMERY A. STORRS, *Counsel for Mackin.*
HENRY WENDELL THOMPSON,
Counsel for Gallagher.
RICHARD S. TUTHILL, *U. S. Attorney.*

(Indorsed:) Filed May 22, 1885. Wm. H. Bradley, clerk.

And thereupon the said Joseph C. Mackin and August Mette, John W. Crawford, Michael C. McDonald, and Dennis Kavanaugh appear 162 in open court and jointly and severally acknowledge themselves to owe and be indebted to the United States of America in the sum of fifty thousand dollars, lawful money of the United States, to be levied upon their several and respective goods and chattels, lands and tenements, rights, credits, and effects, conditioned that the said Joseph C. Mackin personally be and appear before this court on the first day of the next term thereof, to be holden on the first Monday of July next, and from day to day during that and subsequent terms of this court, at the United States court-house in Chicago, in said district, and shall abide the order and the sentence and judgment of the court in this behalf, and not depart without leave of the court or district attorney, then this recognizance to be void; otherwise to be and remain in full force and effect.

And thereupon the said William J. Gallagher and August Mette, John W. Crawford, Michael C. McDonald, and Dennis Kavanaugh appear in open court and jointly and severally acknowledge themselves to 163 owe and be indebted to the United States of America in the sum of fifty thousand dollars, lawful money of the United States, to be levied upon their several and respective goods and chattels, lands and tenements, rights, credits, and effects, conditioned that the said William J. Gallagher personally be and appear before this court on the first day of the next term thereof, to be holden on the first Monday of July next, and from day to day during that and subsequent terms of this court, at the United States court-room, in the city of Chicago, in said district, and shall abide the order and the sentence and judgment of the court in this behalf, and not depart without leave of the court or district attorney, then this recognizance to be void; otherwise to be and remain in full force and effect.

164 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings had in said court in the cause wherein Joseph C. Mackin and William J. Gallagher are plaintiffs in error and the United States of America is the defendant in error, as the same appear from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office, in Chicago, in said district, this seventh day of July, 1885.

[SEAL.] WM. H. BRADLEY, *Clerk.*

(Indorsement on cover:) No. 924. Joseph C. Mackin and William J. Gallagher, plaintiffs in error, vs. The United States. N. Illinois C. C. U. S. Filed August 31, 1885.

117-348

Office Supreme Court U. S.
FILED.
MAR 6 1886
JAMES H. McKENNEY.
CLERK.

Supreme Court of the United States

OCTOBER TERM 1885

No. 924.

JOSEPH C. MACKIN and WILLIAM J. GALLAGHER,
Plaintiffs in Error,

vs.

THE UNITED STATES.

Extracts from the Constitutions and Laws of the States and Territories used in the Oral Argument for the Plaintiffs in Error, and printed in obedience to the suggestion of the Court.

Thomas McGill & Co., Law Printers, Washington, D.C.

Supreme Court of the United States.

UNITED STATES

vs.

MACKIN and GALLAGHER.

Error to Circuit Court of Northern District of Illinois.

Extracts from Constitutions and Statutes of the States and Territories of the United States relating to Infamous Crimes used by Defendant's Counsel in the Oral Argument and printed by Direction of the Court.

[The Italicised Words are made for directing attention to what is Material.]

Alabama.

Code of Alabama of 1876; Constitution of 1875; Article 9:

"That no person shall, for any indictable offense, be proceeded against criminally by *information*, *except* in cases arising in the *militia* and volunteer forces, when in actual service, or by leave of court for misfeasance, misdemeanor, extortion and oppression *in office*, otherwise than is provided in this Constitution: *Provided*, that in cases of petit larceny, assault, assault and battery, affray, unlawful assemblies, vagrancy, and other misdemeanors, the general assembly may, by law, dispense with a *grand jury*, and authorize such prosecutions and proceedings before justices of the peace, or such other inferior courts as may be established by law." (Page 128.)

Same volume, section 151:

"When any person holding any office or place under the authority of this State is sentenced by any court of the United States, of this State, or any other State, to *imprisonment in the penitentiary*, his office or place is vacated from the time of the sentence; and if the judgment is reversed he must be restored, but if pardoned he must not."

Arizona.

Compiled laws of Arizona of 1877, page 103, chapter 11, part I:

"SECTION 3. Public offenses are divided into—

"FIRST. *Felonies;* and

"SECOND. Misdemeanors."

"SECTION 4. A *felony* is a public offense punishable by death, or by imprisonment in a *territorial prison*."

"SECTION 5. Every other public offense is a misdemeanor."

Arkansas.

Code of Arkansas, 1874, page 325, chapter 42:

"SECTION 1224. Public offenses are felonies and misdemeanors.

"SECTION 1225. A *felony* is an offense of which the punishment is death, or confinement in the *penitentiary*.

"SECTION 1226. All other public offenses are misdemeanors."

California.

Code and Statutes of California, of 1876, vol. 2, page 1209:

"SECTION 17. A felony is a crime which is punishable with death, or by imprisonment in the State prison. Every other crime is a misdemeanor."

Colorado.

Constitution of Colorado, Federal Statutes of 1883, page 72, Article 18, Section 4, defines felony as follows:

"The term '*felony*,' wherever it may occur in this constitution or the laws of the State, shall be construed to mean any criminal offenses punishable by death or imprisonment in the *penitentiary*, and none other."

Connecticut.

General Statutes of Connecticut, revision of 1885. Constitution, page XLVI:

"SECTION 9. And no person shall be holden to answer for any crime, the punishment of which may be death or imprisonment for life, unless on a presentment or an indictment of a grand jury." (For common-law offenses, presentment by grand jury unnecessary. 3 Connecticut R., 112.)

Dakota.

Revised Code for 1877, p. 633, section 4:

"Crimes are divided into—

"First. Felonies.

"Second. Misdemeanors.

"SECTION 5. A *felony* is a crime which is, or may be, punishable with death, or by imprisonment in the *territorial prison*.

"SECTION 6. Every other crime is a misdemeanor."

Same volume, page 727:

"SECTION 7. *Every* public offense must be prosecuted by *indictment*, except—

"First. Where proceedings are had for the *removal* of civil *officers* of the Territory.

Second. Offenses *arising* in the *militia* when in actual service, and in the land and naval forces in time of war, or which this Territory may keep, with the consent of Congress, in time of peace."

Delaware.

Revised Code of Delaware, as amended, 1874, page 794, Chapter 133. Section 4 is as follows:

"If any person shall be convicted of a crime deemed *felony* by any law of this State, and judgment be rendered on such conviction, he shall be forever *disqualified* and incompetent to be a *witness* on any occasion, or to make affidavit, or to take an oath or affirmation, except to an answer in chancery, when expressly required by this court, or to make a probate of debts, demands or accounts due to him from an estate of a deceased person."

Constitution State of Delaware, Article 1, Section 8:

"No person shall, for *any indictable* offense, be proceeded against criminally by *information*, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger.

District of Columbia.

Revised Code of the District of Columbia, 1857, chapter 139, section 1:

"All offenses are either *felonies* or misdemeanors. Such offenses as may be punished with death, or confinement in the *penitentiary*, are felonies; all other offenses are misdemeanors." (This code was never adopted.)

And see act of Congress of 1870, 16 Stats., 153; also brief of Shellabarger & Wilson, p. 33.

Florida.

Constitution of Florida, article 1, section 16, provides:

"That no person shall be put to answer *any* criminal charge, but by *presentment*, *indictment*, or *impeachment*."

Georgia.

Code of the State of Georgia, 1882, page 1135, section 4304:

"The term *felony*, when used in this Code, shall be construed to mean an offense for which the offender on conviction shall be liable by law to be punished by death or imprisonment in the *penitentiary*, and not otherwise."

Idaho.

Revised laws of Idaho, 1874–5, page 364, section 2:

"Public offenses are divided into—
"1st. Felonies.
"2d. Misdemeanors."

Section 3:

"A *felony* is a public offense punishable with death, or by imprisonment in the *territorial prison*

Section 4:

"Every (other) public offense is a misdemeanor.

Section 6:

"Every public offense must be prosecuted by indictment, except—

"1st. When proceedings are had for the removal of a civil officer of the Territory.

"2d. Offenses arising in the militia, when in actual service, in time of war, or which this Territory may keep, with the consent of Congress, in time of peace.

"3d. Offenses tried by the justices and probate courts."

Iowa.

Code of Iowa, of 1873, p. 642, section 4104:

"A *felony* is a public offense which is, or in the discretion of the court may be, punished by imprisonment in the *penitentiary*."

Section 1051:

"Every other public offense is a misdemeanor."

McClain's Annotated Statutes of 1880, (Iowa,) vol. 2, p. 1218, article 11, of the Constitution:

"All offenses less than *felony*, in which the punishment does not exceed a fine of one hundred dollars or imprisonment for thirty days, shall be tried summarily before a a justice of the peace, or other officer authorized by law on *information*, under oath, without indictment or the intervention of a grand jury, saving to the defendant the right of appeal; and no person shall be held to answer for any higher criminal offense, except on presentment or indictment of a grand jury, except in cases arising in the Army or Navy, or in the militia when in actual service in time of war or public danger."

Illinois.

Constitution of the State of Illinois, of 1870, article 2, Bill of Rights. Section 8:

"No person shall answer for a *criminal offense* unless on *indictment* of a grand jury, except in cases where the punishment is by fine or by imprisonment otherwise than in the *penitentiary*. In cases of impeachment, and in cases arising in the Army and Navy, or in the militia when in actual service in time of war or public danger: *Provided*, that the grand jury may be abolished by law in all cases."

Article 7, Section 7:

"The general assembly shall pass laws excluding from the right of *suffrage* persons convicted of *infamous* crimes."

SECTION 70, chapter 46, Revised Statutes of Illinois of 1874, provides:

"No person who has been legally convicted of *any crime*, the punishment of which is confinement in the *penitentiary*, shall be permitted to vote at any election unless he shall be restored to the right to vote by pardon. (See Constitution, article 7, section 7.)

Criminal Code of Illinois, Revised Statutes of 1874, chapter 38, division 2, section 5, provides:

"A *felony* is an offense punishable with death, or by imprisonment in the *penitentiary*."

Section 6:

"Every other offense is a misdemeanor."

Indiana.

Revised Statutes of Indiana, 1881, chapter 3, page 298, article 1, section 1:

"*All crimes* and public offenses which may be punishable with death or imprisonment in the *State prison* shall be denominated *felonies;* and all other offenses against the criminal law shall be denominated misdemeanors."

Section 293, page 349:

"Whenever any person is imprisoned in the *State prison*, he shall be kept at hard labor therein during the period for which such person was sentenced."

Kentucky.

General Statutes of Kentucky, 1883, page 317, chapter 29, article 1, section 1:

"Offenses are either *felonies* or misdemeanors. Such offenses as are punishable with death or confinement in the *penitentiary* are *felonies;* all other offenses, whether at common law, or made so by statute, are misdemeanors."

Article 13, section 13, of the Constitution of Kentucky, (Bill of Rights,) General Statutes of Kentucky, 1883, page 121, provides:

"That no person shall, for any indictable offense, be proceeded against criminally by *information*, *except* in cases arising in the *land* or *naval* forces, or in the *militia*, when in actual service, in time of war or public danger, or by leave of court for oppression or misdemeanor in office."

Kansas.

General Statutes of Kansas, 1868, chapter 31, page 383, title "Crimes and Punishments," section 309, declares:

"Whenever the term '*infamous* crime' is used in this or any other statute, it shall be construed as meaning every offense for which the offender on conviction or sentence is declared to be *disqualified*, or rendered incompetent to be a *juror*, or to *vote* at any election, or to *hold* any office of honor, profit, or trust, within this State."

Section 303:

"Every person who shall be convicted of any *felony* punishable under the provisions of this act shall be thereafter disqualified from holding any *office* of honor, profit or trust, or *voting* at any election in this State."

Chapter 82, page 820, article 1, section 4, defines felony:

"A *felony* is an offense punishable by death, or *confinement and hard labor in the penitentiary*."

Section 5:

"All other public offenses are misdemeanors."

Louisiana.

Constitution of Louisiana (1868), title I, (Bill of Rights), Article 6:

"Prosecutions shall be by indictment or information."

Maine.

Revised Statutes of Maine, 1883, page 930, section 9:

"The term '*felony*' includes every offense punishable by imprisonment in the *State prison*."

Same volume, page 937, section 1:

"No person shall be held to answer in any court for an alleged offense, unless on an *indictment* found by a grand jury, except for contempt of court, and in the following cases:

"First. Prosecutions by *information* are expressly *authorized* by statute.

"Second. In proceedings before *municipal* and *police* courts, trial *justices*, and courts-martial."

Massachusetts.

Public Statutes of Massachusetts, 1882, page 1179:

"Any crime punishable by death or *imprisonment in the*

State prison is a *felony*, and no other crime shall be so considered."

Same volume, page 1133, section 3:

"No person shall be held to answer in any court for an alleged crime or offense unless upon *indictment* of a grand jury, *except* in the following cases: When a prosecution by information is *expressly* authorized by *statute;* 2d, in proceedings before a *police, district*, or *municipal* court, or trial *justice;* and, 3d, in proceedings before a *court-martial*."

Michigan.

Howell's Annotated Statutes, volume 2, 1882, page 2278, section 9430:

"The term '*felony*,' when used in this statute, or in any other statute, shall be construed to mean an offense for which the offender on conviction shall be liable by law to punishment by death or imprisonment in the *State prison*."

Maryland.

Constitution of Maryland in this point is like the fifth amendment to the Constitution of the United States.

Minnesota.

Statutes of Minnesota, 1878, page 17, section 7 of the Constitution:

"No person shall be held to answer for a *criminal offense*, unless on a *presentment or indictment* of a *grand jury*, except in cases of *impeachment*, or in cases cognizable by a *justice* of the peace, or arising in the *army* or *navy*, or in the militia, when in actual service in time of war or public danger."

Mississippi.

Revised Code of Mississippi, 1880, section 3104, page 796:

"The terms *felonies* or '*infamous crimes*,' when used in this Code, shall be construed to mean offenses punished with death or *confinement in the penitentiary*."

Missouri.

Revised Statutes of Missouri of 1879, volume I, page 287, section 1676:

"The term *felony*, when used in this or any other statute, shall be construed to mean any offense for which the offender, on conviction, shall be liable to be punished with death or imprisonment in the *penitentiary*, and no other."

Section 1677:

"Whenever the term '*infamous crime*' is used in this or any other statute, it shall be construed as including every offense for which the offender, on conviction or sentence, is declared to be disqualified or rendered incompetent to be a *witness* or *juror*, or to *vote* at any election, or to hold any *office* of honor, profit, or trust within this State."

New York.

Revised Statutes of New York, seventh edition, volume III, 1882, page 2539, chapter I, entitled "Crimes." Section 30 provides:

"The term '*felony*' when used in this act or any other statute, shall be construed to mean an offense for which the offender, on conviction, shall be liable by law to be punished by death *or by imprisonment in a State prison.*"

Section 31:

"Whenever the term *infamous crime* is used in any statute it shall be construed as including *every* offense punishable with death, *or by imprisonment in a State prison, and no other*."

New York Criminal Code of 1885, as amended, chap. 676, sec. 4:

"A crime is either a *felony* or a misdemeanor."

Nebraska.

Compiled Statutes of Nebraska, 1881, page 705, section 247:

"The term '*felony*' signifies such an offense as may be punished with death or imprisonment in the *penitentiary*. Any other offense is denominated a misdemeanor."

Nevada.

Compiled Laws of Nevada, volume I, page 108, sec. 8:

"No person shall be tried for a capital or other *infamous crime* (except in cases of impeachment and in cases of the militia when in actual service, and the land and naval forces in time of war, or which the State may keep, with the consent of Congress, in time of peace, and in cases of *petit larceny*, under the regulation of the legislature,) *except on presentment* or indictment of a *grand jury*."

New Jersey.

Constitution of the State of New Jersey, Art. 1, sec. 9:

"No person shall be held to answer for a criminal offense unless on ~~under~~ the *presentment or indictment* of a grand jury, except in cases of impeachment, or in cases cognizable by justices of the peace, or arising in the army or navy, or in the militia when in actual service, in time of war or public danger."

Statutes of New Jersey (1847) Title VIII, Chap. 4, Sec. 15:

"No *information*, for a matter merely criminal, for which an indictment will lie, and in which no civil right is involved, nor forfeiture or penalty given by law to any private person or informer is prosecuted for, shall, from and after the passing of this act, be accepted or sustained in any court in this State."

New Mexico.

Statutes of New Mexico (1884) Sec. 669:

"A *felony* is a public offense punishable with death, or which is, or *in the discretion of the court may be, punishable* *by imprisonment in the penitentiary or territorial prison;* or any other public offense which is or may be expressly declared by law to be a felony."

Section 670:

"Every other public offense is a misdemeanor."

Section 672:

"No person shall be held to answer for a criminal offense unless on the *presentment or indictment* of a grand jury except in cases of impeachment, or in cases cognizable by a justice, or arising in the army or militia when in actual service, in time of war or public danger."

North Carolina.

Vattel's Revisal, p. 32, sec. 12, Constitution of 1868:

"No person shall be put to answer *any* criminal charge, except as hereinafter allowed, but by *indictment, presentment,* or *impeachment.*"

Oregon.

General Laws of Oregon, (1843–1872), p. 341, sec. 3:

"A *felony* is a crime punishable with death, or which is or may be punishable with *imprisonment in the penitentiary* of this State."

Section 5:

"No person can be tried for the commission of *a crime,* but upon the *indictment* of a grand jury, unless otherwise expressly provided by law."

Pennsylvania.

Brightley's Burdon's Digest, vol. I, p. 31, Constitution, as amended in 1838, 1850, 1857, and 1864, section 10:

"No person shall, for any indictable offense, be proceeded against criminally by *information,* except in cases arising in the *land* or *naval* forces, or in the *militia* when in actual service in time of war or public danger; or by leave of the court for oppression or misdemeanor in *office.*"

Rhode Island.

Public Statutes of Rhode Island, (1882,) page 697, section 1:

"No person shall be put on trial for *any offense* before the Supreme Court or Court of Common Pleas, except upon *indictment* found by a grand jury, or in case of an appeal from the sentence of a justice's court."

South Carolina.

Constitution of South Carolina, (1868,) article I, declaration of rights, section 19:

"All offenses less than '*felony*,' and in which the punishment does not *exceed* a fine of one hundred dollars or *imprisonment for thirty days*, shall be tried summarily before a justice or other officer, authorized by law on information under oath, *without indictment* or intervention of a *grand jury*, saving to the defendant the right of appeal; and no person shall be held to answer for any *higher* crime or offense, unless on *presentment of a grand jury*, except in cases arising in the *land* or *naval* service, or in the militia when in actual service in time of war or public danger."

Revised Statutes of South Carolina, (1873,) page 708, part 4, chapter 127, section 2:

"No person shall be held to answer in any court for an alleged crime or offense, unless upon *indictment* by a grand jury, except in the following cases:

1st. When a prosecution by information is expressly *authorized* by statute.

2d. In proceedings before a *police* court, or trial justice; and

3d. In proceedings before *courts-martial*."

Tennessee.

Code of Tennessee, (1884,) page 1146, section 6051:

"All violations of law, punished by imprisonment in the penitentiary, or by the infliction of the death penalty, are and shall be denominated felonies, and all violations of law punished by final imprisonment in the county jail, or both, shall be denominated misdemeanors."

Constitution of Tennessee, article 1, declaration of rights, section 14:

"No person shall be put to answer any crime in a charge but by presentment, indictment, or impeachment."

Texas.

Laws of Texas, 4th edition, vol. 1, p. 22, article 5, of the Constitution:

"No person shall be held to answer for a capital or otherwise *infamous crime* unless on *presentment or indictment* of a *grand jury*, except in cases arising in the *land* or *naval* forces, or in the militia when in actual service in time of war or public danger."

Same volume, article 3109:

"The following persons only are incompetent to testify in criminal actions." * * *

5. "All persons who have been or may be convicted of *felony* in this or any other State of the United States, or of any other State or kingdom, unless such person or persons may have been pardoned for such crime."

Utah.

Compiled laws of Utah, (1876,) p. 568, section 15:

"A *felony* is a crime which is, or may be punished with death or by *imprisonment in the penitentiary*. Every other crime is a misdemeanor."

Vermont.

Revised laws of Vermont, (1880,) p. 830, sec. 4334:

"Offenses which may be punished by death or *imprisonment in the State prison are felonies*. All other offenses are misdemeanors.

Section 18:

"States attorneys may prosecute by *information* all crimes, *except those which are punishable by death or by imprisonment in the State prison more than seven years.*"

Section 1608:

"No person shall be held to answer in court for an alleged crime or offense unless upon indictment by a grand jury, except in proceedings before a justice, and when a proceeding by information is authorized by law.

Virginia.

Code of Virginia, (1873,) page 1217, chapter 195, section 1:

"Offenses are either *felonies* or misdemeanors. Such offenses as are punishable with death or confinement in the *penitentiary* are *felonies.* All other offenses are misdemeanors."

Page 1238, chapter 201, section 2:

"An information may be filed upon a presentment or indictment of a grand jury, or upon a complaint in writing, verified by the oath of a competent witness; but no person shall be put upon trial for any felony, unless an indictment shall first have been found by a grand jury in a court of competent jurisdiction."

West Virginia.

Code of West Virginia, (1868,) page 21, Bill of Rights:

"No person shall be held to answer for treason, *felony* or other crime not cognizable by a *justice*, unless on *presentment or indictment* of a grand jury."

Same volume, page, 699, section 1:

"Offenses are either *felonies* or misdemeanors. Such offenses as are punishable with death or confinement in the *penitentiary* are *felonies;* all other offenses are misdemeanors."

Same volume, page 713, section 1:

"Prosecutions for offenses against the State, unless otherwise provided, shall be by *presentment* or *indictment.* The trial of the person on a charge of *felony* shall *always* be by indictment."

Washington Territory.

Statutes of Washington Territory, 1855, page 76, chapter of Crimes and Punishment, section 1:

"No person shall be held to answer in any court for *an alleged crime* or offense, unless upon an *indictment* by a grand jury, except in proceedings before a *justice* of the peace, or before a court-martial."

Chapter 2, page 78, section 11:

"All offenses which may be punishable by imprisonment in the *penitentiary* are *felonies*, and all other offenses are misdemeanors."

Wisconsin.

Revised Statutes of Wisconsin (1878), page 17, section 8, of the Constitution of Wisconsin:

"No person shall be held to answer for *a criminal* offense unless on the *presentment* or *indictment* of a *grand jury*, except in cases of *impeachment*, or in cases cognizable by *justices of the peace*, or arising in the army or navy, or in the militia when in actual service, in time of war or public danger."

Same volume, page 1088, section 4637:

"The term '*felony*' when used in any statute shall be construed to mean an offense for which the offender, on conviction, shall be liable by law to be punished by imprisonment in a *State prison*."

Wyoming.

Compiled Laws of Wyoming (1876), page 169, chapter 16, section 1:

"Crimes which may be punished by death or imprisonment in the *penitentiary* shall be denominated *felonies*. And all other offenses against the criminal law of this territory shall be denominated misdemeanors."

Office Supreme Court U.S.
FILED
FEB 23 1886
JAMES H. McKENNEY,
CLERK.

117-348

IN THE

SUPREME COURT of the UNITED STATES.

OCTOBER TERM, A. D. 1885.

No. 924.

JOSEPH C. MACKIN AND
WILLIAM J. GALLAGHER,
Plaintiffs in Error,
VS.
THE UNITED STATES,
Defendant in Error.

On a Certificate of Division between the Judges of the Circuit Cour
of the United States for the Northern District of Illinois.

Argument for Plaintiff in Error

—BY—

JOHN C. RICHBERG,

Of Counsel for Joseph C. Mackin

CHICAGO:
HORACE O'DONOGHUE, BRIEF AND ABSTRACT PRINTER, 95-97 WASHINGTON ST.
1886.

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May it please the Court:

The judges before whom this cause was heard in the Circuit Court upon error to the District Court, having announced that they are divided in opinion upon questions arising on the trial of the same, and having certified to this court five points upon which they are so divided, and ordered the cause to be stayed until the decision of the said points by this court.

These points are of such a character that the question of inquiry as to the guilt or innocence of the accused of the charge preferred against them in the information is not now under consideration, and I am relieved from all necessity of discussing those matters of fact, and, indeed, they cannot, with propriety, be said to be before this court; for, in such a discussion upon these points, the abstract question of law is the real question, and the individual in whose behalf that question is presented does not enter into the contemplation.

I.

WHETHER THE CRIMES, OR ANY OF THEM, CHARGED AGAINST THE DEFENDANTS IN THE COUNTS OF THE INFORMATION, ARE INFAMOUS CRIMES WITHIN THE MEANING OF THE FIFTH ARTICLE OF AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The provision of the amendment applicable here is as follows:

" No person shall be held to answer for a capital, or " otherwise infamous crime, unless on the presentment " or indictment of a grand jury, except in cases arising in " the land or naval force, or in the militia, when in actual " service, in time of war or public danger."

The defendants were tried, upon an information filed, for a conspiracy, under section 5440 of the United States statutes at large. That statute denounces, as a crime, any conspiracy between two or more persons to commit any offense against the United States, where one or more of such parties do any act to effect the object of the conspiracy. The penalties enforced are a fine of not less than $1,000, nor more than $10,000, and imprisonment of not more than two years. The sentence imposed in this case was a fine of $5,000 and imprisonment in the penitentiary of the State of Illinois, at Joliet, for a term of two years.

It is claimed that the court acquired jurisdiction under sections 5512, 5511 and 5403, and that the acts done under general section 5440 are embodied in these sections, and therein denounced as crimes against the United States.

If this case falls within the terms of the decision of this court in the case of *Ex parte Wilson*, that the crimes, or any of them, charged against the defendants, are infamous, then this proceeding is void, and it only remains to be shown that these crimes are such as this court in that case held to be infamous, holding, as I understand that decision, broadly and in the enlightened view of our day and generation, that it is the punishment and consequences to the offender that renders the crime infamous.

It seems to me that the decision of this court in the case of *Ex parte Wilson*, 114 U. S. 417, is decisive and conclusive of this case, to the extent that the plaintiff in error can be subject to trial for the offense charged only by indictment, and not by information.

In the opinion referred to, Judge GRAY quotes approvingly Lord AUCKLAND in his principles of penal law, namely: that " there are two kinds of infamy; the one

" founded in the opinions of people respecting the mode " of punishment ; the other in the construction of law re- " specting the future credibility of the delinquent." The punishment awarded in this case does not fall within the latter classification that, as a matter of law, their competency as witnesses was affected ; but, as a matter of fact, their future credibility is affected " in the opinions of the people," and the standing of a convict in this respect is of that character that his testimony invariably calls for a corroboration before it is given the weight or consideration of a reputable witness.

But the first definition above quoted falls within this case, and to make it clear, the court says that " whether " a man shall be put upon his trial for crime, without " presentment or indictment by a grand jury of his fellow- " citizens, depends upon the *consequences* to himself, if he " shall be found guilty."

Further, it is said, upon quoting from Blackstone: " The question whether the prosecution must be by " indictment, or might be by information, then, is depend- " ent upon the consequences to the convict himself." Therefore, as to what the court, in its discretion, might have done by virtue of the statute under which plaintiffs in error were sentenced, that is, made the punishment lighter by imposing a less fine, a shorter and less harsh punishment is not, and does not affect the question, because the statute authorized the court to award an infamous punishment, which was in fact awarded, and the court, in the Wilson case, say that, " if the accused is in " danger of being subjected to an infamous punishment, " if convicted, he has a right to insist that he shall not be " put upon his trial, except upon the accusation of a grand " jury." Again, it is said: " What punishment shall be "considered as infamous, may be affected by the "changes of *public opinion* from one age to another. "In former times, being put in the stocks was not "considered necessarily as infamous. * * * "But at the present day, either stocks or whipping "might be thought an infamous punishment." It was probably in view of the latter sentiment that Congress, in the last quarter of a century, abolished flogging in the United States navy. There is but one sentiment or opinion among people in reference to a person convicted of a crime for which he is sent to penal servitude: that infamy is his to such a degree that he can never outlive it by the most exemplary habits of life. It follows and haunts him to the grave, and inflicts odium upon his children even unto the third generation. He can no more wipe out the damning record or regain his place than the scarlet woman. The record of infamy is indelibly fixed.

The case of *Jones* v. *Robbins*, 8 Gray, 349, is cited by the court approvingly in the Wilson case, the forcible expressions of Chief Justice SHAW being especially quoted, namely: "Whether we consider the words 'infamous "punishment' in their popular meaning, or as they are "understood by the Constitution and laws, *a sentence to a "state prison for any term of time must be considered as "falling within them.* The convict is placed in a public "place of punishment common to the whole State, subject "to solitary imprisonment, to have his hair cropped, to be "clothed in conspicuous prison dress, subjected to hard "labor without pay, to hard fare, to coarse and meager "food, and to severe discipline."

All, each and every one of which conditions is true of, and applicable to the present case. Again he says: "Some of these a convict in a house of correction is sub-

"ject to, but a *house of correction* under that and the "various names of workhouse and Bridewell, *has not the* "*same character of infamy attached to it.*"

Public opinion draws a wide line of distinction between imprisonment in the penitentiary and in the county jail, because imprisonment in the penitentiary is an infamous punishment, and is the result of an infamous crime. But Judge SHAW goes further, and in language which has met the approval of this court, says: "Besides, "the State prison, for any term of time, is now by law "substituted for all the ignominious punishments formerly "in use, and *unless this is infamous, then there is now no* "*infamous punishment other than capital.*"

In the Wilson case, the court say:

"The scope and effect of this (the 5th amendment), "as of many other provisions of the Constitution, are "best ascertained by bearing in mind what the law was "before. * * * At that time, it was *already* "established law, that the *infamy* which disqualified a "convict to be a witness, depended upon the character of "the crime. The disqualification to testify appears to "have been limited to those adjudged guilty of treason, "felony, forgery, etc., and not to have extended to cases "of private cheats or the uttering of counterfeit coin or "forged securities."

"But the object and very terms of the provision in "fifth amendment show *that incompetency to be a wit-* "*ness is not the only test* of its application. By the law of "England, informations were not allowed for any felony. "The fifth amendment, declaring in what cases a grand "jury should be necessary, and, in effect, affirming the "rule of the common law upon the same subject, substi- "tuting only for capital crimes or felonies, 'a capital or "otherwise infamous crime,' manifestly had in view that "rule of the common law, *rather than the rule* on the "very different question, *of the competency of witnesses.*"

The court, in speaking of the general concert of opinion in the Circuit and District courts toward sustaining informations for any crime, a conviction of which would not, at common law, have disqualified the convict to be a witness, say to this: "The court is of the opinion "that the competency of the defendant, if convicted, to "be a witness in another case, is *not* the true test. When "the accused is in danger of being subjected to an infamous punishment, if convicted, he has a right to insist "he shall not be put upon his trial, except on the accusation of a grand jury. What punishments shall be considered as infamous may be affected by the changes of "public opinion from one age to another."

"For more than a century imprisonment at hard labor "in a State prison or penitentiary, or other similar institution, has been considered infamous punishment in "England and America."

The same view has been forcibly expressed by Chief Justice SHAW. Speaking of imprisonment in the State prison, which by the statutes of Massachusetts was required to be at hard labor, he said: "Whether we consider the "words 'infamous punishment' in their popular meaning, "or as they are understood by the Constitution and laws, "a *sentence* to a *State prison* for any term of time must "be considered as falling within them. * * * "Besides, the State prison for any term of time is now "by law substituted for all ignominious punishments formerly in use, and unless this is infamous, then there is "now no infamous punishment other than capital. This "court, concluding, then say: Imprisonment at hard

" labor, compulsory and unpaid, is, in the strongest sense " of the words, involuntary servitude for crime."

If the plaintiffs in error were to serve their sentence, it would be imprisonment at hard labor, " involuntary servitude for crime." There is no escape from this, once the gates of the bastile at Joliet closes upon them—that place in Illinois where the clouds of heaven look darkest over the dome of the State penitentiary—no hope in the future. Life thereafter is but an existence. The world, society, never receives the convict. Infamous he has been made, infamous he will remain till the grave closes over him, leaving to his children the heritage of a blasted name and reputation.

But this is not all. Section 70, chap. 46, Revised Statutes Illinois, provides that " No person who has been " legally convicted of *any* crime, the punishment of which " is confinement in the penitentiary, shall be permitted to " vote at any election unless he shall be restored to the " right to vote by pardon."

This section was enacted in conformity with the mandate to the Legislature, provided by sec. 7, art. 7, Constitution of Illlinois, which is that " The General Assembly " shall pass laws excluding from the right of suffrage persons convicted of infamous crime." The Legislature, then, in passing that act, considered, and, in fact, made every offense punishable by confinement in the penitentiary an infamous crime.

It is provided by sec. 277, chap. 38, Rev. Stat. of Ill.: " A *felony* is *an offense* punishable with death " or by *imprisonment* in the penitentiary."

Sec. 278: " Every *other offense* is a misdemeanor."

Sec. 1, chap. 40, Rev. Stat. Ill., provides that where a marriage has been contracted and it shall be adjudged that either party has been convicted of felony or other infamous crime, it shall be lawful for the injured party to obtain a divorce and dissolution of such marriage.

Sec. 1, chap. 108, Rev. Stat. Ill., provides: "That "the penitentiary at Joliet, in the county of Will, until "otherwise provided by law, shall be the general penitentiary and prison of this State for the confinement and "reformation, as well as *for punishment* of *all* persons "sentenced by *any court of competent jurisdiction in* "*this State*, for the commission of any crime the "punishment of which is confinement in the penitentiary, "in which the person so sentenced shall be securely con"fined, *employed at hard labor*, and *governed* in the man"ner hereinafter directed."

Section 5539, Revised Statutes of the United States, provides:

"Whenever any criminal, convicted of any offense "against the United States, *is imprisoned* in the jail or "*penitentiary of any State* or Territory *such criminal* "*shall, in all respects, be subject to the same* discipline "and *treatment as convicts sentenced by courts of the State* "or Territory in which such jail or penitentiary is situated, "and while so confined therein *shall be exclusively under* "*the control of the officers having charge of the same,* "*under the laws of such State* or Territory."

Section 5541 of same provides:

"In every case where any person convicted of any "offense against the United States, is sentenced to im"prisonment for a period longer than one year, the court "by which the sentence is passed may order the same to "be executed in any State jail or penitentiary within the "district or State where such court is held, the use of

" which jail or penitentiary is allowed by the Legislature " of the State for that purpose."

As to the construction to be placed upon these sections, I am not without authority of the highest character, for this court, in the case of *ex parte Karstendick*, 93 U. S. 396, in citing and commenting upon these sections, 5539 and 5541, 5540 and 5542, held: "The " language is explicit, and, taken by itself, is certainly " sufficient to authorize imprisonment in penitentiary, *at* " *the discretion* of the court, in all cases where the sentence " is for a longer term than one year. But the counsel for " the petitioner, in their argument, refer to other sections " of the statute, which in terms provide for punishment " at hard labor, and they seek to confine the power of " imprisonment in a penitentiary to such cases; because, " as they claim, imprisonment in a penitentiary necessarily " implies imprisonment at hard labor, and where the " punishment provided for by statute is imprisonment " alone, a sentence to confinement at a place where " hard labor is imposed, *as a consequence of the* imprisonment, is in excess of the power conferred. We " have not been able to arrive at this conclusion. In " cases where the statute makes hard labor a part of the " punishment, it is imperative upon the court to include " that in his sentence. But where the statute *requires* " *imprisonment* alone, the reverse provisions which have " just been referred to *place it within the power of the* " *court at its discretion* to order execution of its sentence " at a place where labor is exacted as part of the discipline and treatment of the institution or not, as it pleases.

" Thus a wider range of *punishment* is given, and " the courts are left at liberty to graduate their sentences, " so as to meet the ever varying circumstances of the "cases which come before them. If the offense is flagrant, the penitentiary, with its discipline, may be called "into requisition; but if slight, a corresponding punish-"ment may be inflicted within the general range of the "law."

The plaintiffs in error were given the extreme punishment and fined $5,000 each.

A word as to the argument of the special counsel, who have filed a brief in this cause on behalf of the prosecution. By them, this authority of the most explicit and commanding character is sought to be overruled by a quotation from Webster's dictionary, defining the words discipline and treatment. If all the definitions given by Webster of these words had been cited, it would be found that those not quoted negatived the position taken as to the applicability of those quoted.

It is then argued that a sentence to the penitentiary, including hard labor, where every convict is put at hard labor, is *not infamous*; but that a sentence to the *penitentiary at hard labor is* infamous. Again, they say: "It is *claimed*, rather than *shown*, that Karsten-"dick had been sentenced to the penitentiary, where he "would be confined at hard labor. The claim was that "imprisonment in a penitentiary *necessarily implied* im-"prisonment at hard labor." If this requires answer, I say I have *shown* by the statutes cited that the plaintiffs in error *would be confined at hard labor by this sentence*, and have *shown* by the same authority that imprisonment in the penitentiary *necessarily implies imprisonment at hard labor;* even if the warden should attempt to evade the law, the contractors, who are entitled to the labor of the convicts, which to them is of great profit, would not permit it.

In referring to the case of *ex parte Wilson* in said brief, counsel finally abandon the attempt to show, that that case is not decisive of the one at bar, and cut the Gordian knot by exclaiming : " The Wilson case belongs " to the class of ' hard cases ' which are proverbial for " making *bad law*. From the report of the case, it " would seem that Wilson's conviction was wholly un" warranted ; that he was guilty of nothing more than a " fraud or cheat. His case appeals strongly to the sym" pathies of the court."

I would merely say to this, that following this case, as reported in the 114 U. S., from page 417 and ending on page 429, on this latter page commences also the decision of this court in the case of the *United States* v. *Petit*, which was an information on Revised Statutes, 5457, for the offense of passing a counterfeit half dollar, the same question was raised and decided in the affirmative, " on the authority of *ex parte Wilson*, decided at the present term."

In one part of said brief it is said the considerations of sympathy in the Wilson case " are conspicuously absent in the present case," and then in another part we are told that " the offense consists simply and wholly in *confedera*" *ting or combining together* to do certain unlawful acts. " From a moral standpoint, there is nothing especially base " or wicked in *mere confederation*." This, then, if I can comprehend the brief, is applicable to the Wilson case, according to the views urged in said brief.

II.

WHETHER THE DEFENDANTS CAN OR NOT BE HELD TO ANSWER IN THE COURTS OF THE UNITED STATES FOR THE CRIMES CHARGED, OR ANY OF THEM, AGAINST THEM HEREIN, OTHERWISE THAN ON THE PRESENTMENT OR INDICTMENT OF A GRAND JURY.

The defendants were proceeded against by information.

Briefly, the origin of prosecuting by information was by filing an information in the exchequer by the King's Attorney-General, and instituted to redress a private wrong, by which the property of the Crown was affected, and to recover forfeitures occasioned by *transgressing those laws*, which were enacted for the establishment and support of *the revenue*, and, in later times, forfeitures of the goods themselves, as well as personal penalties on the parties were inflicted, by act of Parliament, for transgressions against the laws of *customs and excise*. The court in which these informations were filed, namely, the Court of Exchequer, was inferior in rank, not only to the Court of King's Bench, but to the Common Pleas also. It was set up by William the Conqueror, and intended principally to order the revenues of the Crown and to recover the King's debts and duties. The primary and original business of this court was to call the King's debtors to account by *bill* filed by the Attorney-General, and to recover that which belonged to the Crown; and so the jurisdiction of this court was entirely separate and distinct from that of Common Pleas and King's Bench, the latter being to correct all crimes and misdemeanors, the exchequer to adjust and recover the revenue.

True it is, that the right to file information in the Federal courts, is not derived from the common law; their powers come from Congress. There is no common law of the United States, nevertheless, when Congress enacted, by Section 1022, Revised Statutes United States, that "all crimes and offenses committed against the provisions "of chapter 7, title crimes, which are not infamous may be "prosecuted either by indictment or by information, filed "by the district attorney." It is clear that infractions against the revenue are crimes, but not infamous, unless the consequences or punishment makes them so, and as to those not infamous, information would lie.

In cases where they are allowed, a proper regard for the liberty of the individual will not permit them to be filed, unless the proper foundations are laid and leave of court obtained.

Cole on Information, p. 14, says:

"The court always considers an application for a "criminal information as a summary extraordinary remedy, "depending entirely on their discretion, and therefore not "only must the offense itself be of a serious nature, but "the prosecutor must apply promptly, or must satisfac- "torily account for apparent delay. He must also come "into court with clean hands and be free from any blame "with reference to the transaction complained of. He "must prove his entire innocence of everything imputed "to him, and *must produce such legal evidence* of the "offense having been committed by the defendant *as would* "*warrant the grand jury in finding a true bill against the* "*defendant*, otherwise he will be left to the ordinary rem- "edy by *action or indictment*."

In *King* v. *Wellett*, 6 Term Rep. 294, the court say: "The affidavits or oaths of these persons of *what Etherly*

" *had said*, though the fact being that Etherly had carried " a challenge, for which they were proceeding against him " by criminal information, or trying to, the information " or oaths of these persons *would not be legal evidence* " *against the defendant*, and that this court could only " grant on information, *on evidence* that would support a " bill or indictment."

In *United States* v. *Maxwell*, 3d of Dillon, p. 275, the court said they would " require *probable cause of guilt* " *to appear* by the oath of some credible person, before " we will allow an information to be filed and warrant of " arrest issue. If the accusation is a grave one, or where " the charge seems to be doubtful, the court will refuse " leave to file an information, and compel the district attorney to lay it before the grand jury."

I now call attention to the basis upon which this information was filed, which was upon the affidavit of one Albert M. Day, the defendants arrested and held in enormous bail for this kind of an offense—unheard of bail. Day swears that at an election held November 4, 1884, there were votes cast in the district for candidates for representatives in the Congress of the United States, and for other offices, and that afterwards, on or about November 21, 1884, at said district, divers persons unlawfully conspired together to mutilate, change and falsify the poll-books, certificates, etc., and " that this " affiant is *informed and verily believes*, that among " the persons guilty of said conspiracy aforesaid, and " of the acts done in furtherance of said conspiracy " aforesaid, was Joseph C. Mackin, William J. Gallagher, " Arthur Gleason and Henry Biehl; and *this affiant is* " *informed and believes* that each and every of said per-

"sons so named did one or more acts in furtherance of "said conspiracy."

That is, the informer, Day, does not state any information he possesses; he does not claim to have any; he does not make oath that he has any knowledge of or knows that these defendants have committed any crime or offense; he swears *some one* informed him, and he believes the informant. If true, why not take the best evidence; why not bring up *the* informer; let him make oath or appear before the grand jury; why take this hearsay evidence or rumor, and upon that arrest a man for a crime? Is not this a travesty of justice; ought any court to justify the proceedings that have been taken in this case thus inaugurated? It would be grotesque, if it were not outrageous, for any court or grand jury to even receive, let alone to act upon, evidence of this character, upon which to base an arrest and trial. I say the court had no power; it could acquire no jurisdiction to issue a warrant for the arrest of these defendants until *some* evidence was submitted that a crime or offense had been by them committed for which they could be tried in that court.

But I further contend that in this case an information could not be filed under any circumstances, because the offense for which these defendants have been convicted and sentenced *is infamous*. Judge BLODGETT must have so regarded, for he says of it in his charge to the jury: "It is conceded that a great crime has been committed; a "crime in comparison with which armed and open treason "becomes a trivial offense." I must assume that he meant what he said, and cannot presume upon the lattitude allowed to the district attorney, who, upon the trial of the cause, would quite agree with the court in this, but after sentence to the penitentiary for two years, with all its attendant degradation, would argue that the offense is a *mere* misdemeanor, in order that the offender should undergo and suffer the punishment and consequences of an infamous crime, and be branded with infamy for all time.

III.

ARE THE PAPERS, RECORDS, RETURNS, POLL-BOOKS, BALLOTS, TALLY-LISTS, CERTIFICATES, OR OTHER PAPERS DESCRIBED IN THE 6TH AND 7TH COUNTS OF THE INFORMATION, RECORDS, PAPERS AND PROCEEDINGS, OR DOCUMENTS, SUCH AS ARE EMBRACED BY OR DESCRIBED IN SECTION 5403, REV. STAT. OF THE UNITED STATES, AND IS THE COUNTY CLERK'S OFFICE OF COOK COUNTY, ILLINOIS, A PUBLIC OFFICE, AND SUCH CLERK A PUBLIC OFFICER, WITHIN THE MEANING OF THAT SECTION, AND WITH REFERENCE TO THE LAWS OF THE UNITED STATES AND OF THE STATE OF ILLINOIS, UPON THE SUBJECT OF ELECTIONS?

This section provides that "every person who will-"fully destroys, or attempts to destroy, or with intent to "steal or destroy, takes and carries away (1) any record, "paper or proceeding of a court of justice, filed or de-"posited with any clerk or officer of said court, or (2) any "paper or document or record filed or deposited in any "public office, or with any judicial or public officer, shall," etc.

The inquiry here is, does this relate, or was it intended to relate to election papers, or to affect frauds perpetrated at elections? What was the intent of Congress when this law was enacted? Was it designed to relate to election frauds?

This section became a law in 1853—long before Congress had assumed or undertaken any control of the question of congressional elections in the different States, and when it was passed it was embodied in an act entitled "An "act for the prevention of frauds upon the United States "Treasury." There certainly could be no frauds upon the treasury by stealing or destroying the various election returns enumerated. Any record paper or proceeding of a court of justice does, and of necessity must, refer to a United States court; and "or deposited with any clerk or officer of *said* court," does, and, must of necessity, refer to a clerk or officer of the United States court; and (2) "any paper or document or record filed in any public office," does, and of necessity must refer to a public office of the United States, namely, the treasury, or "with any judicial or public officer," necessarily a United States judicial or public officer. Can or will it be contended that Congress would or could pass an act to protect State judicial officers, or State records, documents and offices, and punish the offenders?

To illustrate: Section 5405 provides that every person who attempts to influence the action of any grand or petit jury shall be punished by fine, etc. Suppose, then, a person attempted to influence a grand or petit jury of a State court, would a United States court have jurisdiction to try and punish the offender? Even though it be assumed that State courts were incompetent to enforce justice, the time for that is not present; it may come; if it does, it will be when States are no more, and the legend United States has given way to the word America, and all courts under government control and jurisdiction; when States will be known geographically only as provinces, governed by one set of courts and one set of laws; when the central government assumes jurisdiction of and over all.

Section 5600 provided that "the arrangement and "classification of the several sections of the revisions have "been made for the purpose of a more convenient and "orderly arrangement of the whole, and, therefore, no "inference or presumption of a legislative construction is "to be drawn by reason of the title under which any par"ticular section is placed."

The learned judge who tried the case below, in his argument to the jury, said, that for the purposes of this section (I should say for the purposes of this case in order to make a conviction), the office of County Clerk of Cook County, Illinois, was a public office of the United States, and he and his deputies were United States officers. I in vain have tried to find by what process of legerdemain Congress in 1853 made this county office a public office of the United States, and the County Clerk and his deputies United States officers, for the purpose of fitting into an election law of Congress, passed *subsequently*, in 1867, to effect an election fraud in 1884, committed in said county, on the vote of a member of the Illinois Legislature. Verily, that Congress of 1853 were wise in their day and generation. In an old Italian tome we find it was held that, in order to secure the right to exact a pound of flesh, there must not be a drop of blood, nor, when the law gives a pound, it were a crime to take less than the pound, but it is advocated to take more than the pound, and all blood, to force a conviction; the old plea was for mercy; in the latter, the cry of crucify him is manifest. Portia was the better Daniel.

It is doubtless good law, that where a verdict is general, and there be bad counts, but if there is one good count the verdict will stand; but it is equally good law, that in a criminal case erroneous instructions are not cured by those given which are good, for no one can know but what the jury found the defendant guilty on the erroneous instruction.

Steinmeyer v. *The People*, 95 Ill. 383.

As to these two counts (6th and 7th) for the violation of section 5403, his Honor, Judge **BLODGETT**, charged the jury that the defendants were charged "also "to violate section 5403, by conspiring to destroy a "paper, to wit, the poll-book, tally-sheet and ballots, "which were properly deposited in the office of the "county clerk, being a public office, wherein such poll-"books, tally-sheets and ballots were properly deposited "for the purpose of furnishing the proof authenticating "the election of a member of Congress, *and for that* "*purpose the office of county clerk of this State is a public* "*office of the United States.*"

This I hold to be unqualifiedly erroneous. True, the judge says the office of a clerk of a county of a State is a public office of the United States. From whence comes his power so to declare it? If he declared that the Governor of Illinois was a public officer of the United States, I apprehend it might well be said we give your declaration to the winds; it has no more efficacy. Over this office the laws of the State of Illinois only hold sway; the office and the officer are governed by its laws. Its records and papers and the custody, the mutilation, destruction or stealing of them are held subject and protected from violation by the laws of the State of Illinois, and not by the laws of the United States, for *any purpose* whatever; only by virtue of the laws of the State were these papers and documents placed in that county office, in charge of the county officer, and not by virtue of any law of the United States. Congress would not have the power to designate in what county or State office the returns of an election should be deposited; that is a matter that pertains purely to local self-government. This is an attempt to obtain jurisdiction by false pretense, pretending that a fact exists which does not exist; pretending that a fact existed which everybody knew did not exist; pretending that the election for representatives in Congress had been affected by some frauds, when everybody who knew anything about it, knew that no such election had been affected; when everyone knew and knows that the only effect of those frauds and the only offices affected by them, was upon the vote for State senator, and that the attempt, even there, did not succeed, and it is an unworthy pretense that there was any fraud against the representative for Congress affected or intended.

IV.

DO THE FACTS STATED IN THE FIRST, SECOND OR THIRD COUNTS OF THE INFORMATION CONSTITUTE A CONSPIRACY TO COMMIT AN OFFENSE AGAINST THE UNITED STATES, UNDER SECTION 5512 OF THE REVISED STATUTES?

There is no averment in any of these counts that the offenses charged affected or were intended to affect the election of a representative in Congress; nor was it claimed, or any evidence given at the trial, that such was the case. On the contrary, it is charged, and was proven at the trial, that the offenses were intended to and did affect the election of a State senator, and the offenses were perpetrated for this and no other purpose.

And the jurisdiction of the court rests exclusively upon the act of Congress, and draws its power from no other source. Those powers must be exercised closely and narrowly within these limits. In giving an interpretation to this section, I am aided by adjudged cases to reach, as I believe, a satisfactory conclusion.

In the case of *United States* v. *Nicholson et al.*, 3 Woods, 217, Judge WOODS says, in his charge to the jury, in referring to section 5415 of this same act, in which section 5412 is found upon the same subject matter: "I instruct you that Congress has no power to punish a State " officer for the violation of a State law *if it only affects* " *the election of State*, parish or ward *officers*, and that " section 5415 of the Revised Statutes of the United States " *does not* undertake to punish State officers for violation " of State law, so far as such violation only affects the " election or result of an election of State, municipal or " parish officers. * * * It is clear that *the* " *purpose of this law was only* to punish a violation of the " State regulation *so far as such regulations affected the* " *election, or the result of an election, of a member of* " *Congress, and no further.*

" The vital question in this case is, what was the intent " of the commissioners in using the third ballot box? The " prosecution charges that it was done for the purpose of " affecting the election of a member of Congress or the " result thereof, no matter how much *it affected* the results " of the election of ward officers, parish officers and *mem*- " *bers of the State Legislature.* We have nothing to do " with that; and *unless the purpose* of the defendants *was* " *to affect the election of a member of Congress, there can* " *be no conviction in this case.*"

In the case of *ex parte Siebold*, 100 U. S. Rep. 393, there was a divided court, but in the majority opinion it is expressly stated: " We do not mean to say, however, that " for any acts of the officers of election, having exclusive

" reference to the election of State and County officers,
" they will be amenable to federal jurisdiction; nor do we
" understand that the enactments of Congress now under
" consideration have any application to such acts."

The question, then, of jurisdiction divides itself into separate inquiries:

First—Did the overt acts affect the election of a member of Congress?

Second—Were they intended to affect such election?

I do not conceive the inquiry to be, whether by some remote possibility or contingency, these acts might have affected the election. But, did they affect such election? Whether they did or not is a matter susceptible of explicit proof. Whether they might, under circumstances which may be imagined, is not a legitimate subject of judicial inquiry. And unless the defendants *intended* to affect such an election for representative in Congress, there can be no legal or justifiable conviction.

In these counts, and, indeed, *nowhere* in this information, is there an averment, nor the suggestion even of an averment, that the conspiracy, or the object of the conspiracy, or the acts done under it, did affect, or were intended to affect, the election of member of Congress, or that the conspiracy embraced within its boundaries any such purpose. Nor is there an averment, or the shadow of an averment, that, in point of fact, any of the acts done in furtherance of the conspiracy did affect the election of a member of Congress.

Again, the record is barren of any proof establishing, or tending to establish, either of these propositions. There is not the slightest evidence that any or either of the acts done did affect the election of a member of Congress; nor is there the slightest evidence that any person on trial had any such purpose or object in view, or even entertained any such intention. On the contrary, I may say that the case demonstrated that the election of a member of Congress was not affected, and that neither of these defendants ever entertained any such purpose.

V.

SO THE FACTS STATED IN THE 4TH AND 5TH COUNTS OF THE INFORMATION, CONSTITUTE A CONSPIRACY TO COMMIT AN OFFENSE AGAINST THE UNITED STATES UNDER SECTION 5411 OF THE REVISED STATUTES.

The criticism herein made upon the first, second and third counts, in reference to want of proper and sufficient averments as to the intent to affect or the affecting of the election of a member of Congress, apply equally to these (four and five) counts.

The offenses under section 5411, are for *interference* " at *any election* for representative in Congress with any " officer of *such election.*" That is, such interference with such officer or inducing him to commit a violation of duty, is only an offense if it affect the election for representative to Congress. If such officer was induced by unlawful means to declare the result for State senator, can it be claimed that such interference is an offense against the United States? No deputy or deputy clerk, Gleason or Biehl of the county clerk, had a duty to perform in regard to the election for representative to Congress.

An officer of election is one who officiates at the election. Ryan, the county clerk, was not an officer of election; he had nothing to do with it, and no duties whatever connected with, until after the result was declared by the judges of election in the various polling places, and the counts show that he was but a canvassing officer *after* the election. It is not pretended that there was any alteration whatever, except as to the vote for State senator. The poll list, ballots and tally list, and certificate, embraced the vote for and names of all candidates, both State and National. The alteration made was on State senator, and that alone. Did that impair the balance of the certificate?

I answer, that neither in theory nor in fact did this fraudulent change as to the vote of State senator have any such effect so as to destroy that which had not been altered, because this certificate was not indivisible ; it certified to the vote of a score of different candidates for a score of different offices. Now did the alteration of the vote of one of these candidates destroy, render nugatory and invalid the certificate as to the balance, which were not tampered with ? Now, if I am correct in my view of the case that the balance of the certificate stands, notwithstanding the fraudulent alteration as to the vote for State senator, two conclusions seem to be inevitable : First, that nothing in that direction charged in the information did in point of fact affect the election for representative to Congress; and, second, that all the evidence in this case showing, or tending to show the fraudulent change in the vote for State senator, was entirely irrelevant and incompetent.

Admit that the ballots were destroyed, the certificate and returns being in existence, the election for congressman would not have been affected, nor indeed would the election of any other officer whose name was upon the ballots thus destroyed. In point of fact, they can ever become of but little use after having been cast and *counted*. In the case of *Bairdstown, Virginia*, 76 Ill. 45, the claim having been made for the rejection of the returns of the entire vote of the precinct, because the county clerk and two justices of the peace, when acting as a canvassing board, had none of the ballots or affidavits used at the election in the precinct—they had been lost or destroyed, the court says: "It cannot form ground for the exclusion of the whole vote of the precinct."

These ballots, as actually cast, were canvassed, and the return thereof made as required by law. They then became *functus*. The evidence upon which the canvassers (County Clerk) act is not the ballot, but the returns. There has been no period of time when reference to these original ballots was necessary, and there is no law which sustains the proposition, that returns and certificates, proper in form and fact, will be rendered invalid or ineffectual, in the absence of the original ballot upon which they were placed, for the evidence upon which the canvassers act is not the ballots, for they do not act upon them at all, but the returns are the authority, which were not affected, or even intended to be affected, by the forgery, except as to the vote for State senator, and the whole length and breadth, height and depth of the scheme was to defeat, by forgery, the election of Mr. Leman to the State Senate. For trial and punishment of all the offenses charged, the State courts had ample power, and were entitled to original and exclusive jurisdiction, and competent to meet out justice. In fact, indictments against all of these parties for these very offenses are now therein pending. I refrain from suggesting why these proceedings were instituted in the District Court, because not necessary for the questions herein involved, as they are of a legal and not political nature.

In conclusion, I respectfully urge that the old methods of fanciful and strained reasons in interpreting statutes has been abandoned, and courts will attach to words the same meaning in which they are ordinarily employed and understood.

Under the beneficent spirit of our laws, no man should be subject to trial and punishment which blackens his name, renders his character infamous and degrades his family, unless the charge upon which he is tried has been based upon legal evidence, and not merely upon information which some one may claim to possess. This information stands upon a foundation of information and belief; no man, however humble, should be subject to a trial for a crime upon a charge prefered by an individual person, based solely and exclusively upon his belief, not having any knowledge or cognizance of the facts upon which he prefers the charge. Unlike some, I do not believe it necessary to violate fundamental legal principles in order to maintain or enforce one law, or that in order to do so, we violate another.

And thus believing that in this case fundamental principles, most essential to the protection of the liberty of the citizen, have been violated, and that the Constitution of the United States, in one of its most vital features, has been disregarded, I ask that the wrong be righted; and to do this no crime need go unpunished, and no substantial right go unvindicated.

And, finally, I conclude by saying I leave this cause and these questions, with most respectful submission, to this court.

JOHN C. RICHBERG,

Of Counsel for Joseph C. Mackin,

Plaintiff in Error.

117-348

[illegible]
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States

OCTOBER TERM 1885

No. 924.

JOSEPH C. MACKIN and WILLIAM J. GALLAGHER,
Plaintiffs in Error,

vs.

THE UNITED STATES.

On a Certificate of Division in Opinion between the Judges of the Circuit Court of the United States for the Northern District of Illinois.

BRIEF FOR PLAINTIFFS IN ERROR,

By SAMUEL SHELLABARGER and
JEREMIAH M. WILSON.

Thomas McGill & Co., Law Printers, Washington, D.C.

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IN THE

Supreme Court of the United States.

October Term 1885.

Joseph C. Mackin and William J. Gallagher,
Plaintiffs in Error,
vs.
The United States.

No. 924.

On a Certificate of Division in Opinion between the Judges of the Circuit Court of the United States for the Northern District of Illinois.

The present case comes into this court upon certificate of division, in pursuance of sections 651 and 652 of the Revised Statutes, from the Circuit Court of the United States for the Northern District of Illinois, the certificate being found in the Record at pages 103 and 104.

The prosecution in the District Court was upon information presented by the attorney for the United States for the Northern District of Illinois, and the information is found on pages 7 to 17 of the Record. The prosecution is based upon section 5440 of the Revised Statutes, which, for convenience, we insert, as follows:

"If two or more persons conspire either to commit any offence against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than two years."

As the points upon which the court divided all arise upon the face and character of the information and the different counts thereof, and as these counts are long, we shall attempt at the outset to make an abstract of them, throwing out all words not necessary, in order to give the pith of each count; this for the purpose of convenience and clearness.

The counts are seven in number. The acts alleged in the first, second, and third counts of the information as done by the defendants (plaintiffs in error) in pursuance of the conspiracy, are acts claimed to be rendered unlawful by section 5512 of the Revised Statutes, and that part of this section 5512 which is supposed to render said overt acts unlawful, is as follows:

> "Or if any such officer or other person who has any duty to perform in relation to such registration or election, in ascertaining, announcing, or declaring the result thereof, or in giving or making any certificate, document, or evidence in relation thereto, knowingly neglects or refuses to perform any duty required by law, or violates any duty imposed by law, or does any act unauthorized by law relating to or affecting such registration or election, or the result thereof, or any certificate, document, or evidence in relation thereto, or if any person aids, counsels, procures, or advises any such voter, person, or officer to do any act hereby made a crime, or to omit any act the omission of which is hereby made a crime, every such person shall be punishable as prescribed in the preceding section."

The first part of the section confines the section to registrations and elections at which a Representative or Delegate in Congress is elected.

The fourth and fifth counts of the information set forth as the overt acts done in pursuance of the conspiracy, certain acts which are claimed to be rendered unlawful by section 5511 of the Revised Statutes. This section 5511 also relates to elections for Representatives or Delegates in Congress. The part of this section 5511 which is claimed to render unlawful the overt acts set forth in counts four and five, provides that "If at any election for Representative or Delegate in Congress any person knowingly * * * interferes in any manner with any officer of such election in the discharge of his duties."

The overt acts set forth in the sixth and seventh counts of the information are acts claimed to be rendered unlawful by section 5403 of the Revised Statutes. This section 5403 is in the chapter entitled "Crimes against Justice." It is as follows:

> "Every person who wilfully destroys or attempts to destroy, or, with intent to steal or destroy, takes and carries away any record, paper, or proceeding of a court of justice, filed or deposited with any clerk or officer of such court, or any paper, or document, or record filed or deposited in any public office, or with any judicial or public officer, shall, without reference to the value of the record, paper, document, or proceeding so taken, pay a fine of not more than two thousand dollars, or suffer imprisonment, at hard labor, not more than three years, or both."

SYNOPSIS OF FIRST COUNT.

The first count of the information in substance is as follows:

That on the 4th of November, 1884, a general election was held in Illinois, as provided by law, "for the choosing of a Representative in the Congress of the United States from each of the several Congressional districts of the said State, and certain State and county officers;" at a certain poll of said election, to wit, second district 18th ward, Chicago, in Cook county and said judicial district, and the fourth Congressional district of the State, 600 votes and upwards were cast by voters at that poll for Representative in Congress from that Congressional district; afterwards, to wit, the day last aforesaid, on closing said poll of election, and on the proceeding by judges of election to canvass the votes there polled, the clerks of election made two tally lists in writing, purporting to show the votes received by each candidate voted for in form required by law; afterwards, on the 5th of November, same year, at said county and judicial district, upon examining and counting votes so cast at said poll of election, proper judges and clerks made on each of poll books of said poll a certificate in form required by law, purporting to show name of every person voted for and the number of votes received, and the office for which votes received; thereupon one of said poll books with said certificate, and one of said tally lists constituting return from said poll, having been enveloped and sealed up, were put in the hands of judges of election who delivered same so sealed up to county clerk of Cook county and his deputies at the office of county clerk. That Joseph C. Mackin, William Gallagher, Arthur Gleason, and Henry Biehl, of Chicago, conspired together, and with others unknown, "to break open the package aforesaid and remove therefrom the said return therein contained, and to mutilate and alter said certificate, and to make away with and destroy the said tally list, and to substitute for and in place thereof a false and spurious paper writing in form of and purporting to be such tally list," the said Gleason and Biehl, and one of the unknown persons, being deputies of county clerk, "and by law charged with the duty of keeping safe and unopened and intact the said package and its contents aforesaid, the same then and there still remaining sealed up in the office of the said county clerk and the said returns not then having been opened, canvassed and published by the proper canvassing officers of the county aforesaid."

That to effect the object of the conspiracy, said Gleason and Biehl, and the person unknown, being such deputies charged with such duty, "unlawfully did make opportunity for and permit the breaking open of said package and the removing of the said return therefrom, and the altering and falsifying of the said return." That further to effect the object of the conspiracy, said Mackin and Gallagher "unlawfully did break open the package aforesaid, and remove therefrom the said return so therein contained." And further to effect the object of the said conspiracy, said Gallagher did "mutilate and alter the said certificate by erasing the word 'four' in the sentence 'Henry W. Leman had four hundred and twenty votes for State Senator,' as originally written in the said certificate, and writing in place of the said word 'four' the word 'two,' so as to make the said sentence read and appear to be 'Henry W. Leman had two hundred and twenty votes for State Senator;' and by erasing the word 'two' in the sentence 'Rudolph Brand had two hundred and seventy-four votes for State Senator,' as originally written in the said certificate, and writing in the place of the same word 'two' the word 'four,' so as to make the said sentence read and appear to be 'Rudolph Brand had four hundred and seventy-four votes for State Senator.' And further to effect the object of the said conspiracy, the said Gallagher 'then and there unlawfully did make a false and spurious paper writing in form of and purporting to be such tally list as aforesaid, and the same false and spurious paper writing then and there did unlawfully substitute for and in the place of the same tally list in the said county clerk's office.' And further to effect the object of the conspiracy, Mackin and Gallagher then and there "unlawfully did make away with and destroy the same tally list, against the peace," &c.

SYNOPSIS OF SECOND COUNT.

The second count proceeds as the first until the averments regarding the acts of officers of elections in making returns. It then avers that on the 5th of November the proper judges and clerks of election made on each poll book of the poll a certificate as required by law, and also such judges enveloped and sealed up the ballots deposited at the poll; and thereupon said ballots so sealed up and one poll book with certificate thereon were delivered, pursuant to law, to the county clerk of Cook county and his deputies at the office of county clerk. And that said Mackin, Gallagher, Gleason, and Biehl "unlawfully did conspire together, and with divers other persons unknown, to break open said package so containing said ballots, and to remove from the said package a large number of said ballots, and to make away with and destroy those ballots which should be so removed, and to substitute for and in place thereof a like number of false and spurious printed papers in form and resemblance of such ballots, and to remove from the said county clerk's office and make away with and destroy the poll book and certificate last aforesaid, and to substitute for and in place of said poll book and certificate false and spurious paper writings in form and purporting to be such poll book and certificate respectively," they (Gleason and Biehl and one unknown person) being deputies of county clerk, and charged by law with duty of keeping safe and unopened last named package and its contents aforesaid, and safe and intact the poll book and certificate, such package and contents being sealed up and remaining with poll-book and certificate in clerk's office. And to effect object of conspiracy said Gleason and Biehl and the unknown person, so being deputies charged with said duty, "unlawfully did make opportunity for and permit the breaking open of the last-mentioned package and the removing from the same a large number of the said ballots so therein contained, and the removing of the last-mentioned poll-book and certificate from the said county clerk's office. That further to effect the object of conspiracy, said Mackin did unlawfully cause and procure to be printed two hundred and upward spurious ballots in resemblance of said ballots sealed up, to be substituted for said ballots so to be removed and made away with. That further to effect object of conspiracy, Mackin and Gallagher unlawfully did break open the package last aforesaid, and remove therefrom and make away with and destroy two hundred and upward of said ballots, and substituted in place of those removed a like number of false ballots. And further to effect object of conspiracy, said Mackin and Gallagher unlawfully removed from clerk's office and made away with and destroyed said poll-book and certificate. And further to effect object of conspiracy, said Gallagher made a false paper writing purporting to be poll-book, and another false paper purporting to be said certificate, and the two false paper writings last mentioned did unlawfully substitute in the place of the poll-book and certificate so filed in the clerk's office, against the peace, &c.

SYNOPSIS OF THIRD COUNT.

The third count, like the first and second, avers the holding of the election, the casting of the votes for Representative, &c., and avers that poll-book of the poll with certificate of proper judges and clerks, as required by law, and tally-list of same poll in form required by law, were delivered, pursuant to law, to county clerk of Cook county and his deputies at clerk's office, and at same time said ballots deposited at poll of election and other poll-book of same poll with like certificate of proper judges and clerks were delivered, pursuant to law, to county clerk and his deputies at office of county clerk. That said Mackin, Gallagher, Gleason, and Biehl conspired together, and with unknown persons, to mutilate said certificate on poll-book in this count first mentioned; to remove from said clerk's office and destroy said tally-list; to substitute therefor false tally-list; to remove from said office and destroy ballots aforesaid; to substitute in place of same like number of false ballots, and to remove from office and destroy the other poll-book in this count mentioned, and certificate on same, and to substitute false and spurious paper in place of said poll-book and certificate, they (said Gleason and Biehl and the unknown deputy) being deputies of county clerk and by law charged with the duty of safekeeping in clerk's office of said poll-books, certificates, ballots, and tally-lists in this count mentioned, the same then remaining in said office. And to effect object of said conspiracy, Gleason and Biehl, and the unknown deputy, then being deputies of county clerk charged with said duty, did "unlawfully make opportunity for and permit the removing of the tally-list in this count mentioned, and a large number, to wit, two hundred and upwards of ballots in this count mentioned and the poll-book and certificate in this count secondly mentioned, from the said county clerk's office." And further to effect object of same conspiracy, said Mackin, Gallagher, Gleason, and Biehl, and the unknown person, did mutilate, &c., said certificate on poll-book in count mentioned, by erasing the word 'four' in the sentence 'Henry W. Leman had four hundred and twenty votes for State Senator' as originally written in the same certificate, and writing in place of the said word 'four' the word 'two,' so as to make that sentence read and appear to be 'Henry W. Leman had two hundred and twenty votes for State Senator,' and by erasing the word 'two' in the sentence 'Rudolph Brand had two hundred and seventy-four votes for State Senator' as originally written in same certificate, and writing in the place of same word 'two' the word 'four,' so as to make the said sentence read and appear to be 'Rudolph Brand had four hundred and seventy-four votes for State Senator.' And did unlawfully remove from said clerk's office and destroy said tally-list, and substitute spurious tally-list, and did cause to be printed false ballots, two hundred and over, and to be substituted in the place of the ballots intended to be destroyed, and did unlawfully remove from clerk's office and destroy the poll-book and certificate in this count secondly mentioned, and substituted in place of same poll-book and certificate false and spurious ones, against peace.

SYNOPSIS OF FOURTH COUNT.

The fourth count is similar in its averment, as to holding election and the character of the election, etc., to the preceding ones, but avers that said Mackin, Gallagher, Gleason and Biehl conspired together, and with persons unknown, "to interfere with one Michael Ryan, then being county clerk of the said Cook county, and such two justices of the peace of the said county as he should associate with him for the purpose of opening and canvassing the several returns of the same election within county aforesaid in the discharge of the duties of them," the said Ryan, county clerk, and said two justices of the peace, that is to say, before opening and canvassing said return from said poll "to mutilate and alter the certificate last aforesaid and to remove from the said county clerk's office and destroy the tally list last aforesaid, and to substitute for and in place thereof a false and spurious paper writing in form of and purporting to be such tally list," such poll book, certificate and tally list then remaining in said clerk's office. And to effect object of conspiracy, Mackin, Gallagher, Gleason and Biehl unlawfully did mutilate and alter the certificate last aforesaid by erasing 'four,' etc., giving the same alterations as given in other counts.

SYNOPSIS OF FIFTH COUNT.

The fifth count, after alleging the holding of the election as in preceding counts, avers that certain ballots cast at said poll by voters, "being ballots as well for Representatives in the said Congress from said Congressional district as for divers State and county officers," and there was remaining in said clerk's office with said clerk a certain poll book of said poll with certificate thereon as required by law, and thereupon said Mackin, Gallagher, Gleason and Biehl conspired together, and with persons unknown, " to interfere with said Michael Ryan, then and there being the county clerk of the county aforesaid, in the discharge of his duties in that behalf, that is to say, unlawfully to remove from the said county clerk's office and destroy a large number of ballots last aforesaid, and to substitute for and in place of the same ballots which should be so removed and destroyed, a like number of false and spurious printed papers in the form and resemblance of such ballots," and to remove from office and destroy poll book and certificate, and to substitute in place of poll book and certificate spurious ones; said ballots so cast at said poll then being in clerk's office. And to effect object of conspiracy said Mackin, Gallagher, Gleason and Biehl " did unlawfully remove from said county clerk's office and destroy " said ballots and substitute false papers in resemblance of ballots, and did remove said poll book and certificate and substitute spurious ones ; and so said Mackin, Gallagher, Gleason and Biehl did conspire together, with persons unknown, " to interfere with an officer of election for Representative in Congress, in the discharge of the duties of that officer of election," and said Mackin, Gallagher, Gleason and Biehl did commit and do acts to effect object of conspiracy, against peace, etc.

SYNOPSIS OF SIXTH COUNT.

The sixth count avers that a general election had been held on the 4th of November, as appointed by law, for choosing Representative in Congress and certain State and county officers, and that there was on the 5th of November, same year, remaining deposited in the office of county clerk of Cook county a certain return of election from the poll for the second district, eighteenth ward of Chicago, and fourth Congressional district of State, at which election a Representative in Congress from said Congressional district, among other officers, was voted for, part of which return was a tally list in writing as required by law; that said Mackin, Gallagher, Gleason, and Biehl unlawfully did conspire together, with persons unknown, to carry away said tally list with intent of stealing and destroying the same, and said tally list did wilfully destroy, said return last aforesaid including tally list remaining deposited in said clerk's office and with said county clerk; that to effect object of conspiracy, Mackin, Gallagher, Gleason, and Biehl and person unknown did unlawfully carry away said tally list with intent to steal and destroy, and did unlawfully destroy the same. And further to effect object of conspiracy, Mackin, Gallagher, Gleason, and Biehl and unknown person made false paper purporting to be such tally list and substituted it in the clerk's office in place of the tally list destroyed; and said Mackin, Gallagher, Gleason and Biehl did conspire together, and with other person unknown, to take away with intent to steal and destroy a paper, document, and record deposited in a public office and with a public officer, and to destroy the same paper, document, and record so deposited; and that said Mackin, Gallagher, Gleason, and Biehl and person unknown did in manner and form, &c., commit and do acts to effect the object of same conspiracy, against peace, &c.

SYNOPSIS OF SEVENTH COUNT.

The seventh count recites that a general election was held for choosing Representative in Congress for said Congressional district, etc., and divers State and county officers, and that on 5th of November there were remaining deposited in said county clerk's office certain ballots which had been cast at said poll, said ballots being at once ballots for Representative in Congress in that Congressional district and for divers State and county officers; that there was remaining in said office and with county clerk a poll book of said poll with certificate of proper officers thereon, as required by law; and further that said Mackin, Gallagher, Gleason, and Biehl unlawfully did conspire together, and with persons unknown, to carry away large number of ballots aforesaid and the poll book and certificate with intent and purpose of stealing and destroying the same ballots which should be carried away and same poll book and certificate, and wilfully to destroy such ballots, poll book and certificate; the said ballots, poll book, and certificate so remaining deposited in clerk's office and with clerk. That to effect object of conspiracy said Mackin, Gallagher, Gleason and Biehl, and person unknown, unlawfully did take and carry away with intent and for the purpose of stealing and destroying two hundred and upward ballots, and the poll book and the certificate, and the same ballots, poll books, and certificates then and there did "wilfully destroy." That further to effect the object of said conspiracy said Mackin, Gallagher, Gleason and Biehl, and person unknown, did cause and procure to be printed large number of false ballots and to substitute the same in the place of the ballots carried away. And further to effect object of conspiracy said Mackin, Gallagher, Gleason and Biel and persons unknown unlawfully did make and cause to be made two false and spurious paper writings in form of and purporting to be respectively the poll book and certificate aforesaid, and the false, spurious writings did substitute in the place of the poll book and certificates respectively in said clerk's office, and so said Mackin, Gallagher, Gleason and Biehl in manner and form did conspire with others unknown to take and carry away with intent and purpose of stealing and destroying papers, documents and records deposited in public office with a public officer wilfully to destroy same papers, documents and records so deposited, and that said Mackin, Gallagher, Gleason and Biehl, and the persons unknown, in manner and form, etc., did commit and do acts to effect the object of said conspiracy, against the peace, etc.

The questions submitted by the Circuit Court to this court are in the following words:

1. Whether the crimes, or any of them, charged against the defendants in the counts of the information are infamous crimes within the meaning of the fifth article of Amendment to the Constitution of the United States?

2. Whether the defendands can or not be held to answer in the courts of the United States for the crimes charged, or any of them, against them herein, otherwise than on presentment or indictment of a Grand Jury?

3. Are the papers, records, returns, poll-books, ballots, tally lists, certificates or other papers described in the sixth and seventh counts of the information, records, papers, proceedings, or documents such as are embraced by or are described in section 5403 of the Revised Statutes of the United States, and is the county clerk's office of Cook county, Illinois, a public office, and such clerk a public officer within the meaning of that section, and with reference to the laws of the United States and of the State of Illinois upon the subject of elections?

4. Do the facts stated in the first, second, or third counts of the information constitute a conspiracy to commit an offense against the United States under Section 5512 of the Revised Statutes?

5. Do the facts stated in the fourth and fifth counts of the information constitute a conspiracy to commit an offense against the United States under Section 5511 of the Revised Statutes?

The extracts from the laws of Illinois which, we believe, are the only ones material to be here inserted, are as follows:

First. Section 70, chapter 46, set forth on page 9 of our associate's (Mr. Richbarg's) brief filed herein, and section 7, article 7, of constitution of Illinois, same page.

These prohibit from voting any unpardoned convict to the penitentiary.

Second. Section 277, chapter 38, Rev. Stats., making to be a felony every offense punishable with either death, or imprisonment in the penitentiary; and section 278 making every other offense a misdemeanor. (See same page, same brief.)

Third. Section 1, chapter 40, Rev. Stats., Ill., authorizing the injured party to obtain a divorce from any one convicted of felony or other infamous crime. (See same brief, pages 9 and 10.)

Fourth. Section 1, chapter 108, Rev. Stats., Ill., making the penitentiary at Joliet the general penitentiary and prison of the State for the confinement and reformation, as well as punishment, of all persons convicted by competent judgment of any crime punishable by confinement in penitentiary, and concluding with the words "in which the person so sentenced shall be securely confined, *employed at hard labor* and governed in the manner hereinafter directed." (See p. 10, same brief.)

The other sections of the laws of Illinois here brought into question are the following:

Paragraph 62, section 61, chapter 40, 1 Rev. Stats., Ill., p. 1009, provides:

"When the votes shall have been examined and counted the clerks shall set down in their poll books the name of every person voted for written at full length, the office for which such person receives such votes, and the number he did receive, the number being expressed in words at full length; such entry to be made, as nearly as circumstances will admit, in the following form." (Form given, signed by the judges of election, countersigned by the clerks of election.)

Paragraph 63, page 1010, provides as follows:

"Such certificate, together with one of the lists of voters and one of the tally papers, having been carefully enveloped and sealed up, shall be put into the hands of one of the judges or board of election, who shall, within four days thereafter, deliver the same to the county clerk or his deputy, at the office of said county clerk; and when received, such clerk or deputy shall proceed to open, canvass, and publish the return from each precinct or election district as provided by law."

Paragraph 60, section 50, p. 1009, is as follows:

"All the ballots counted by the judges of election shall, after being read, be strung upon a strong thread or twine, in the order in which they have been read, and shall then be carefully enveloped and sealed up by the judges, who shall direct the same to the officer to whom by law they are required to return the poll books, and shall be delivered, together with the poll books, to such officer, who shall carefully preserve the said ballots for six months, and at the expiration of that time shall destroy them by burning, without the package being previously opened: provided, if any contest of election shall be pending at such time in which such ballots may be required as evidence, the same shall not be destroyed till such contest is finally determined."

Paragraph 6, section 6, chapter 35, p. 687, Rev. Stats., Ill., provides:

"He (county clerk) may appoint deputies, who shall take and subscribe the same oath for the discharge of their duties as is required of him, which shall be entered of record in his office."

Paragraph 7, same page, reads:

"The principal clerk shall, in all cases, be responsible for the acts of his deputies."

Paragraph 73, chapter 46, section 71, page 1012, provides:

"Within seven days after the close of the election the county clerks of the respective counties, with the assistance of two justices of the peace of the county, shall open the returns and make abstracts of the votes in the following manner as the case may require: Of votes for Governor and Lieutenant-Governor on one sheet; of votes for other State officers on another sheet; of votes for Presidential electors on another sheet; of votes for Representatives to Congress on another sheet; of votes for Judges of the Supreme Court on another sheet; of votes for Clerk of the Supreme Court on another sheet; of votes for Judges of the Circuit Court on another sheet; of votes for Senators and Representatives to the General Assembly on another sheet; of votes for Members of the State Board of Equalization on another sheet; of votes for other County Officers on another sheet. The foregoing abstracts shall be preserved by the county clerk in his office."

BRIEF.

At the time of preparing the present brief counsel have not seen any brief filed on behalf of the Government in this court, and, therefore, in the discussion upon which we enter we shall be compelled, in so far as this discussion is in the nature of a reply, to rely upon what is disclosed as the positions of the Government by the record in this case and by the briefs for the Government in the court below.

The questions numbered 1 and 2, submitted by the Circuit Court to this court, are essentially the same, and we shall therefore consider them together as one.

We will first consider whether Section 5440 defines and punishes an offense, "infamous" within the meaning of the fifth article of amendment, considered independently of the matter of the political, civil, and social consequences attached, by the laws of Illinois, to imprisonment in the State penitentiary.

Section 5440 of the Revised Statutes, already given, provides: "If two or more persons conspire * * * to commit any offense against the United States * * * all the parties to such conspiracy shall be liable to * * * imprisonment not more than two years." The offenses which, by the information in this case, are attempted to be alleged as those which the parties conspired to commit, are, as already stated, defined in Sections 5512, 5511, and 5403 of the Revised Statutes. Therefore, the question in this case is whether or not a party who is charged with an offense, the punishment of which *may be* imprisonment not more than two years, and which imprisonment may be in a penitentiary, can be prosecuted by information, or whether it must be by indictment.

It having recently been decided by this court in the case *ex parte* Wilson, (114 U. S., p. 417,) that imprisonment in the penitentiary at hard labor is an infamous punishment within the meaning of said fifth amendment, we shall assume it as being settled law, for the purposes of this case, that where the sentence is or may be at hard labor in the penitentiary, the prosecution must be by indictment. And therefore the question that is left for consideration in this case is whether, where the section under which the prosecution is had provides simply for imprisonment, and where that imprisonment may be in a penitentiary, but the statute does not make any provision whatever in respect of hard labor, such a case is within the class of infamous punishments and must be by indictment.

We are relieved by the very able discussion of this whole subject, found in the opinion of Justice Gray in the case of *ex parte* Wilson above cited, from considering a considerable number of questions which have hitherto given the profession and the courts infinite vexation, and brought great confusion upon this branch of the law. These points, settled by this decision of the court, we wish, at the outset, to carefully here state. They are as follows:

First. As already stated, that imprisonment in a penitentiary at hard labor is an infamous punishment, and can only be inflicted after indictment or presentment by a grand jury.

Second. That the test as to whether a crime is infamous or not, within the meaning of the fifth amendment, is not that it disqualifies from being a witness, (p. 426.)

Third. That the test of infamy or non-infamy is not the character at common law of the crime itself, but is to be found in the nature of the punishment which is by the statute attached to the conviction—not the consequence to others of the crime or the consequence to society—but the consequences attached by the law to conviction to the prisoner himself, (p. 423, et seq.)

Fourth. That the test of infamy or not is not determined by the question as to what judgment of punishment shall turn out in fact to be ultimately inflicted by the court; but is, on the contrary, what is the utmost degree of punishment to which the accused may, under the prosecution, be subjected. Or, stating this in the very words of the court, it is as follows:

> "The question is whether the crime is one for which the statute *authorizes* the court to award an infamous punishishment; not whether the punishment ultimately awarded is an infamous one. When the accused is in danger of being subjected to an infamous punishment, if convicted he has the right to insist that he shall not be put upon his trial except on the accusation of a grand jury," (p. 426.)

In view therefore of the propositions of settled law, as we have just derived them from *ex parte* Wilson, our first proposition is that since the imprisonment prescribed by section 5440 may be for a period of two years, and since section 5541 authorizes a person so sentenced for any period over one year to be "imprisoned in any State jail or penitentiary in the District or State where such court is held," therefore, as to crimes denounced by section 5440, it is expressly provided by direct law of Congress that any person convicted under that section 5440 may be imprisoned in the State penitentiary. And since this is true, therefore the punishment denounced by act of Congress in these two sections as against the conspiracy defined in section 5440 is infamous.

We state this our first proposition, as already remarked, without regard to the consideration of the civil or the political consequences attached by the laws of Illinois to an imprisonment of one of her citizens in their State penitentiary, and we consider it upon and in the sole light of the provisions of sections 5440 and 5541, and in the further light of the known and universally recognized infamy which attaches to penitentiary imprisonment, as distinguished from other and less infamous imprisonments.

Stated in another and shorter way this proposition is this: that every imprisonment under the laws of the United States in the penitentiaries of the States is an infamous punishment, and can only be inflicted after action by the grand jury.

The considerations upon which we rely in support of the proposition that imprisonment in penitentiaries is, in the United States, infamous punishment, we may condense as follows:

1. That the acts of Congress make imprisonment in the penitentiary or jail for a period of over a year the equivalent of imprisonment in the penitentiary or jail at hard labor for any length of time, however short, as prescribed in section 5542. Thus, these two sections, 5541 and 5542, show that the infamy of over a year's imprisonment is the

equivalent of any imprisonment, however short, at hard labor.

2. Section 5539 subjects all prisoners imprisoned in the State jail or penitentiary "in all respects to the same discipline and treatment as convicts sentenced by the courts of the State or Territory in which such jail or penitentiary is situated." And this being so, and assuming now, for the sake of the point, that this discipline and treatment here mean something in some way distinguishable from "*punishment*," yet this subjection to penitentiary discipline and treatment is, in the universally recognized opinion and sentiment of the people of the United States, infamous. It is this "discipline and treatment" of which Chief Justice Shaw speaks in the case of Jones *v.* Robbins, 74 Mass. (8th Gray), 349, quoted by this court in *ex parte* Wilson, where the Chief Justice says:

> "Now it seems to us that, whether we consider the words 'infamous punishment' in their popular meaning or as they are understood by the Constitution and laws, a sentence to State prison for any term of time must be considered as falling within them. The convict is placed in a public place of punishment common to the whole State, subject to solitary imprisonment, to have his hair cropped, to be clothed in conspicuous prison dress, subjected to hard labor without pay, to hard fare, to coarse and meagre food and to severe discipline."

By the common judgment of the entire country, this confinement and treatment to which every penitentiary convict is subjected, as this court judicially knows, is infamous. Or, as expressed by Chief Justice Carter, in the case of the United States *v.* Cross, (1 MacArthur, bottom of p. 152, top of p. 153,) "the almost universal method of determining the infamy of a crime in the several States in this Union is, by the express declaration of the Legislatures of the several States, adopting the wall of the penitentiary as the wall between the offenses made infamous and the offenders left to be tolerated by the law outside of the penitentiary."

To attempt to strip this treatment, to which every penitentiary convict is subjected, of the degradation and infamy that attaches to it by inevitable necessity, by calling this treatment and discipline something else than punishment, calling the rose another name—calling it, for example, schooling—is we think a refinement of nonsense that is not tolerated by the humanity of the law in which the fifth amendment to the Constitution has its foundation.

3. Another consideration showing that the penitentiary in this country is a place of infamy appears by the fact that it, in our country and in all the States, has taken the place of all punishments below capital, many of which at the common law were unquestionably infamous, and includes all that were at common law infamous.

Stated in another way, by the unvarying and universal law of the United States, and of our States, it is so that convicts sentenced to the penitentiary are, in their treatment there, subjected to substantially identical treatment, discipline and punishment, and all felons of the most heinous character are put upon an equality with, and in constant contact and association with, every other convict. This is, as to each respective convict alike, we submit, infamy. Or, as expressed by Chief Justice Shaw in the case already cited, we say of it that, "The State prison for any term of time is now by law substituted for all the ignominious punishments formerly in use, and unless this is infamous there is now no infamous punishment other than capital."

The views stated in the last preceding three paragraphs are irresistibly strengthened, if not demonstrated, by an analysis of the provisions of those sections of the statute that are brought into review in the opinion of this court in Karsdendick's case, 93 U. S., 396.

Stated in our own language, the substance and legal effect of the present point is this, that Section 5539 in providing that where the sentence involves imprisonment for over a year the convict may be sent to any suitable State jail or penitentiary where the Legislature has so authorized, is a provision which this court has conclusively adjudicated as designed to furnish scope and opportunity to the judicial discretion of the sentencing court to inflict higher punishment in cases accompanied by circumstances of greater enormity and turpitude than in cases less heinous.

In other words, these provisions, this court has said, are designed to impose upon the more flagrant class of offenders the penitentiary of the State as distinguished from the jail to which the less flagrant offender may be sent.

In still other words, the interpretation given by the court to these provisions of the statute is that the treatment and discipline of the penitentiary, whether that be cropping the hair, conspicuous clothing, solitary confinement, coarse food, uncompensated work, or aught else, is resorted to instead of the jail, on account of the greater aggravation of the offense. This interpretation, therefore, makes the subjection of the prisoner to confinement in the penitentiary, and his subjection to the treatment and discipline of the penitentiary as distinguished from the jail, to be inflicted on account of the greater enormity of his crime. If this is not, therefore, "*punishment*" for crime, it is something that brings it within the infamy of the fifth amendment, and the discussion about mere words in this connection becomes a vain thing.

Or, stated once more, this court has decided in the Karsdendick case, *supra*, that although the statute itself makes no mention of hard labor in connection with the imprisonment to be inflicted, yet the court is authorized to require that hard labor as a part of the punishment, in that it is authorized to confine the party in a penitentiary where hard labor is required of United States convicts. The language of the court on that subject is as follows: (p. 399.)

> "But where the statute requires imprisonment alone, the several provisions which have just been referred to place it within the power of the court at its discretion to order execution of its sentence at a place where labor is exacted as part of the discipline and treatment of the institution, or not, as it pleases. Thus a wider range of punishment is given, and the courts are left at liberty to graduate their sentence so as to meet the ever-varying circumstances of the cases which come before them. If the offense is flagrant, the penitentiary with its discipline may be called into requisition. But if slight, a corresponding punishment may be inflicted within the general range of the law."

So that the court may impose the hard labor, which is done by simply sending the party to the penitentiary where hard labor is required. Or, it may send him to a jail where labor is not required.

Any other view than those stated in the preceding paragraph would result in this absurdity, to wit, that since it must be admitted that every United States convict sent to the State penitentiary under Section 5539, may be, and generally is, required to render the same uncompensated labor as other convicts are, then if the liability to this treatment does not render his conviction and imprisonment infamous, we have this result,—that A may be convicted and sent to the penitentiary at hard labor for a period of two years. The punishment of A is conceded to be infamous. B is sentenced the same day for two years, and sentenced to imprisonment in the same penitentiary for two years. These two, A and B, enter the penitentiary together; their hair is cropped at the same time; they are clothed in the same kind of garments; they eat the same food and from the same table, and work at the same bench during this period of two years. They alike sleep separately in solitary cells; they march together in the same lock step; they are punished the same for offenses against prison discipline, and so on. And yet, while it is conceded that the punishment of A is infamous, it is contended by the government that that of B is not, and in order to reach this conclusion that the one is infamous and the other is not, it is necessary to resort to the simple and sole fact that the special section under which the prosecution is had does not provide that this imprisonment shall be at hard labor; while the fact is that the court, as authorized by other sections, by the simple force of its judgment, has subjected him not only to the hard labor, but to all the other ignominies incident to such an imprisonment, and this judgment of the court is authorized by the various sections of the statute to which reference has heretofore been made.

In other words, the contention on the part of the government is, that because the particular section of the statute under which the prosecution is had does not contain the words "hard labor," the offense is not infamous, although that section taken in connection with the other sections does impose hard labor.

4. It may be, and, we believe, is contended by the government, that in order to bring a punishment or sentence within the class "infamous," it is required that the judgment itself shall disclose the elements of punishment which constitute or are essential to the infamy. As applied to the present case, the contention would be, that, although sections of the statute other than 5440 do authorize the judge to sentence the convict to prisons where hard labor is by law required and endured, yet since this cannot enter into the face of the judgment itself, therefore the punishment is not infamous, although the punishment endured, and endured in virtue of other sections, is of the infamous class.

This, we submit, is not a sound position, and is repudiated by this court. Where the law itself, other than the very clause under which the court prescribes the punishment, affixes to the punishment named in the judgment certain legal consequences, which consequences render the convict infamous, there the punishment is an infamous one, although these legal consequences of the punishment stated in the judgment are not embodied in the judgment.

This point is distinctly stated by this court in U. S. *v.* Waddell, (112 U. S., p. 82,) where the court says :

> "The pertinency of these remarks will be seen when we observe that Section 5508, after defining the punishment of those convicted under it, by fine and imprisonment, adds : 'And (they) shall, moreover, be thereafter ineligible to any office, or place of honor, profit or trust created by the Constitution or laws of the United States.' When we bring this language, which is not the sentence of the court but an indelible disgrace affixed to the party convicted, by the declaration of the law itself, into direct connection with the language of the fifth article of amendment of the Constitution, namely, that 'no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury,' there does arise a very serious question whether this crime is not made an infamous one by the language of the statute, and cannot, therefore, be prosecuted by information."

Here the court recognizes that the quality which renders the punishment infamous need not appear in the judgment itself, in this particular case that quality being disqualification to hold office. So here, although the sentence of the court does not show that hard labor may be the consequence of the conviction, yet other sections do show this ; do authorize the judge to sentence to penitentiaries where hard labor is inevitable; do subject the convict to all the disgrace attaching to the most heinous felonies there being punished.

What we have said in regard to the case of *ex parte*

Wilson renders it unnecessary to review the authorities cited in the court below for the defendants—such as—

U. S. *v.* Yeates, 6 Federal Reporter, 861;
U. S. *v.* Cross, 1 MacArthur, 149;
U. S. *v.* Maxwell, 3d Dillon, 275;
U. S. *v.* Black, 4 Sawyer, 211;
U. S. *v.* Sheppard, 1 Abbott C. C., 437;
U. S. *v.* Wynn, 3 McCrary, 266;

as these cases and all others of the same class cited by the Government to show that information may be resorted to in penitentiary cases are, in the main, cited, and all discredited by the case of *ex parte* Wilson.

We now turn to another, and somewhat distinct, branch of the present inquiry. In what we have presented above there is included this element, as affecting the question whether a sentence under section 5440 is infamous punishment, namely, that we have assumed that, in so far as the laws of Illinois require of all convicts, whether Federal or State, in the State penitentiary, involuntary labor, etc., etc., and since the sections, in the acts of Congress, which we have commented upon, subject every person sentenced under section 5440 to a liability or "danger" of being sentenced to such State penitentiary, therefore these provisions of the State law, so requiring hard labor, will be looked to by the Federal courts, and will affect the question of infamy or non-infamy of the punishment authorized by section 5440.

The proposition we now come to is, in its legal elements, like the one last stated, and we may state the proposition thus:

Whenever Congress, acting within its constitutional powers, makes a provision of law the terms of which provision involve a reference to a law, institution, regulation, or other creature of another State or jurisdiction than its own, and makes the meaning, effect, or execution of such law of Congress dependent upon the state of such foreign legislation, institutions, or creations, there the act of Congress makes, to the extent required by the language used, such legislation of the other State to be a part of its own legislation, and makes that legislation, etc., to affect and determine, to the extent indicated by the act of Congress, the character of the legislation of Congress.

This principle is quite a familiar one.

Take, for example, the case of *ex parte* Yarbrough, (110 U. S., 651, 663,) where one question being considered was whether the right of a colored person to be unmolested in his right to vote for a member of Congress was a right derived from the Constitution and laws of the United States as distinguished from a right derived from the laws of a State, it being there contended that such right was derived from the State law and constitution defining the qualification of electors for the most numerous branch of the State legislature. This contention this court repudiated. Upon this point the court says:

> "They" (the States) "define who are to vote for the popular branch of their own legislature; and the Constitution of the United States says the same persons shall vote for members of Congress in that State. It adopts the qualification thus furnished as the qualification of its own electors for members of Congress.
>
> "It is not true, therefore, that electors for members of Congress owe their right to vote to the State law in any sense which makes the exercise of the right to depend exclusively on the law of the State."

Here, then, we have a case where the laws of the United States (in this case the Constitution) adopt, and make part of themselves, the laws of the States by reference thereto.

This doctrine is restated in U. S. *v.* Waddell, 112 U. S., 77, *et seq.*

The same legal principle is found strongly enforced and illustrated in the (now familiar) case of *ex parte* Sibold, (100

U. S., 371, 383, 388.) There, in considering the question whether Congress may, in regard to State elections where a member of Congress is to be elected, add to, alter, or change the existing legislation of the State, the court reaches the conclusion that Congress may do so; and that where an act of Congress changed the State election laws they became paramount; and that Congress may affix its own penalties to the violation of such intermingled Congressional and State legislation. In concluding the discussion the court says, in regard to this intermingled legislation, (bottom of page 388,) that—

> "The State laws which Congress sees no occasion to alter, but which it allows to stand, are, in effect, *adopted* by Congress."

We might, of course, indefinitely increase the number of references, in acts of Congress, to laws and institutions of the States, and which references in acts of Congress to such laws and to institutions of the State become, for the purpose of Federal legislation, "adopted" into such Federal legislation. But such increase of references cannot be useful here, it being unquestionably the settled law of this court that the Federal laws may qualify themselves by so "adopting" State legislation. And the question we are thus brought to, in the present case, is whether the laws of Congress, to which we have referred, in authorizing the courts to sentence convicts to State prisons and in subjecting them to the "same treatment and discipline" as the laws of the State impose upon said convicts, do not thereby adopt, as a part of the punishment which is imposed by the laws of Congress, so authorizing the courts to sentence convicts, those punishments and disqualifications which are imposed upon all such State convicts in such penitentiaries by the laws of the States?

We insist that this is, incontestably, the fact and law of this matter. Indeed, this is so manifestly true that it seems difficult to make the matter plainer by argument.

Here is an act of Congress which allows the courts to impose two years' imprisonment, and another act which authorizes the court, in every case of such imprisonment, in its discretion, to sentence to a State jail or a State penitentiary. Then, by another section it expressly requires that the "treatment and discipline" of such Federal convicts shall be the same as are imposed by the laws of the States. This, therefore, is an express adoption, *quoad hoc*, of the laws of the States into the laws of Congress; and the laws of the States as to this subject-matter become the laws of Congress. Therefore, when the laws of the States prescribe hard labor, coarse food, cropping of the hair, ignominious dress, and the like, as a part of the "treatment and discipline" of such State convicts, the laws of Congress adopt, into themselves, these requirements as to every Federal convict so authorized to be sentenced and punished.

But we now consider some objections to this view of the matter. One of the objections is very well stated by Justice Treat, in the case (overruled by *ex parte* Wilson) of the United States *v.* Wynn, (3 McCrary, 274 *et seq.*) He says, in resisting the view which we have stated:

> "It must suffice, however, that no State legislation can enlarge or restrict Federal authority, nor can such legislation create or qualify a Federal offense. Each State may, for purposes of its own, designate what shall be considered offenses against its authority, and characterize them as felonies or otherwise; but its legislation in such respects cannot override Federal laws, or supply their supposed defects, in matters exclusively within Federal cognizance; hence, the United States courts cannot look to State legislation for assistance."

Another method of stating the objection to the view that we now urge is stated in substantially this form: That if it be competent for the States, through their legislation, to attach to a conviction, *in the Federal courts*, a disqualification to hold office under the State, a disqualification to vote in the State, an authorization, as against the Federal convict, of a divorce from him by his wife owing to the Federal conviction, or the like, then the States may enact that *any* person convicted in the United States courts for some trivial offense, and sentenced to imprisonment in a jail, shall thereby be deprived of his civil and political rights under the State government, and thus *render* the trivial offense "infamous,"—then it is within the power of the States to compel the Government of the United States to prosecute *all* offenses by indictment, and to prohibit the prosecution of *any* by information.

Of course the answer to both this position, stated by Justice Treat, as above quoted, and also to this other objection last stated, is the obvious one that no such interference by State legislation with the laws of Congress, the definition, prosecution, and punishment of offenses and the like, is possible in any case except where some law of *Congress* has "adopted" the State legislation, and made such State legislation *its own*, and wherever Congress has thus "adopted" the State legislation and made it the legislation of Congress, then these objections and all similar difficulties totally disappear.

Apply, therefore, the positions now stated to the present case, and we have this result: The laws of Illinois, as we have seen, attach, as against every citizen of Illinois, to a conviction and sentence to the State penitentiary of that State, the consequences of disqualification to hold office; the disqualification to vote; authorization, as against convict, of divorce from his wife, and the like. With these laws in force in Illinois, Congress passes a law which says that persons convicted under said section 5440 shall be imprisoned for not over two years; another law which says that the court may sentence such convict to the penitentiary of the State of Illinois; and another law which says that in such penitentiary he shall receive the same treatment and discipline as State convicts receive under the laws of Illinois. This, we submit, is an adoption of the laws of Illinois in regard to what shall be the legal consequences of a conviction and sentence of one of its citizens for a penitentiary offense.

And please observe that it is quite immaterial for the purposes of the present case as to whether these sections of the laws of Congress authorizing imprisonment in the penitentiary of Illinois, of a convict citizen of Illinois, will be held to involve and be followed by the civil and political consequences to which we have alluded as applied by Illinois to State convicts; because if such sentence be not followed by political and civil forfeitures, yet the punishment remains equally infamous if the conviction and sentence be followed by liability to being subjected to hard labor during the imprisonment. This being decided by *ex parte* Wilson, is sufficient for the purposes of the present case.

We have already remarked sufficiently upon the distinction made by counsel for the Government in the court below between what is called in the Federal section the same "treatment and discipline" and "punishment." It is contended that treatment and discipline here does not mean and is not a part of "punishment." We have seen in our quotations from and allusions to the case of Karsdendick (93 U. S. 396) the scope and margin in the way of discretion allowed to the court. There the court completely negatives the view that the discipline and treatment of the State penitentiary spoken of in section 5539 is not part of the punishment. In speaking of this discipline and treatment the court, on page 399, says that where the statute makes hard labor part of the punishment "it is imperative upon the court to include that in the sentence." Then the court proceeds to say, in substance, that where the statute does not expressly make hard labor a part of the punishment, then the making of hard labor to be a part of the punishment is left to be discretionary with the court. This it does in these words:

> "But where the statute requires imprisonment alone, the several provisions which have just been referred to place it within the power of the court, at its discretion, to order the execution of its sentence at a place where labor is exacted as a part of the discipline and treatment of the institution, or not, as it pleases. Thus a wider range of *punishment* is given, and the courts are left at liberty to graduate their sentences so as to meet the ever-varying circumstances of the case which comes before them. *If the offense is flagrant*, the penitentiary with its discipline should be called into requisition. But if slight, a corresponding '*punishment*' may be inflicted upon the general range of the law."

Thus in express words the court makes this confinement in the penitentiary, where hard labor is exacted, to be a part of the punishment, although it is called "treatment and discipline." It is punishment to which the court is authorized to resort in its sentence by reason of what the court here calls the "flagrant" character of the offense. The "wider range of punishment" spoken of by the court, is the choice which the STATUTE gives to the court between sentence to the State jail and sentence to the State penitentiary. The court makes a sentence to the State penitentiary to be a higher grade of punishment, including hard labor, because of the flagrant character of the offense.

In connection with this part of the discussion we wish to say that in one of the most conspicuous criminal trials which ever occurred in the history of this country, the very question we now consider came before the Supreme Court of this District in criminal term.

In the case of the United States *v.* Brady, (reported in 3 Cr. L. Mag., 69,) the prosecution was under the same section under which the present prosecution is, section 5440.

The proceeding was originally commenced by information. The motion was to quash the proceeding by information, because the offense being prosecuted was infamous. The decision was by Justice Cox. The conclusion reached by the court is thus epitomized in Abbott's National Digest, vol. 2, p. 223:

> "That a conspiracy to defraud the Government in the letting of mail contracts, (as charged in the Star Route cases), is, by reason of the legislation of Congress fixing the punishment, an infamous crime, and therefore not triable by information."

The argument for the Government in this case was one of great length and of signal ability, and was participated in by the Attorney-General in person. Justice Cox, in reaching the conclusion to dismiss the prosecution, based his decision upon the nature of the punishment prescribed by section 5440, involving imprisonment as explained in the case of Karsdendick, (93 U. S. 396,) and upon the provisions of the act of Congress of June 17, 1870, (16 Stats., 153.)

In concluding the discussion of questions Nos. 1 and 2, submitted by the Circuit Court to this court, we now beg especial attention to the provisions of this last named act of Congress. It reads as follows:

> "That there shall be established in the District of Columbia a court to be called the Police Court of the District of Columbia, which shall have original and exclusive jurisdiction of all offenses against the United States committed in the District of Columbia, not deemed capital or otherwise infamous crimes, that is to say, of all simple assaults and batteries, and all other misdemeanors not punishable by imprisonment in the penitentiary, and of all offenses against any of the ordinances of the city of Washington, or of the city of Georgetown, or laws of the Levy Court of the County of Washington."

This statute, we submit, has very weighty significance in the present trial. It is a definition by Congress of what offenses are infamous within the fifth amendment. It makes the test of infamy to be whether the offense is one punishable by imprisonment in the penitentiary. Every crime of that class is classed by this act of Congress under the head of infamous. This court has in *ex parte* Wilson indicated what is obviously true, that the will of Congress controls the question of infamy; that it is not necessary that any act of Congress should expressly pronounce the offense infamous in order to make it such. In other words, this case, amongst other things, gives to Congress the power to determine the question of infamy or non-infamy. In this act Congress has, for that place where pre-eminently it has plenary constitutional power to define and punish crime, to wit, at its own seat of government, and for the purposes of all offenses in that District, explicitly defined what crimes are infamous. It has said that all are such which are punishable by imprisonment in the penitentiary.

This declaration of Congress upon this subject, then, over which Congress has full power, ought to be and will be controlling with the courts upon a question like this. The court will hardly tolerate the idea that one rule as to what is infamous shall be conclusively fixed and established by law in the District of Columbia for all crimes there committed and tried, and have a different rule applied to offenses committed within the body of the States.

If our appeal to this statute relating to the Police Court of the District of Columbia should be deemed, by the court, legitimate for no other purpose than as a *legislative interpretation* of the meaning of the fifth amendment to the Constitution, then as such mere legislative interpretation it is, with this court, entitled to exceeding great weight, for the reason already stated, namely, that that Legislature (Congress) has plenary power to make every such crime infamous as it shall so declare. In this statute Congress has given its sense of what is infamous. To say that this definition or interpretation of Congress shall have force *only* in the District of Columbia, and that the word "infamous" shall have a totally different sense in other parts of the country, leads to absurd results, and this court has very often said what is said in the case of the U. S. *v.* Kirby in regard to the construction of a criminal statute. There the court uses the following language:

> "All laws should receive a sensible construction. General terms should be so limited in their application as to not lead to injustice, oppression, or absurd consequences." (7 Wall., 488.)

The same thing is repeated in Carlisle *v.* The U. S., (16 Wall., 153.)

This is again repeated in Oates *v.* National Bank, (100 U. S., 244;) and again in Chewheong *v.* U. S., (112 U. S., 555.)

The application which we seek to make of these citations for the present case is an obvious one. If this statute, relating to the District of Columbia, should be held to be a mere *local* definition of what offenses are "infamous" within the sense of the laws of the United States, and not to be a definition of infamy applicable to *all* the criminal laws of the country, and not to be binding upon the other Federal courts and officers of the country than those of the District of Columbia, then consequences of the most absurd and unjust character result from such interpretation of this law. Under such interpretation, for example, a person being prosecuted for an offense committed in Alexandria, Va., or within two miles of this Capital in Maryland, under Section 5440, might be proceeded against in the United States courts without indictment, without any of those protections coming from the interposition of a grand jury as a condition precedent to being put on trial for a crime, which are so appropriately and strongly stated by Justice Field in his charge to the grand jury in the Circuit Court in the District of California, August 22, 1872, (2 Sawyer, 667 et seq.) And yet, for the *same* crime precisely, and committed under the same circumstances and conditions in the District of Columbia, the offender would be protected by the interposition of a grand jury between him and any possible prosecution. Such an interpretation of this statute makes one thing infamous under the same criminal section in one district and non-infamous in another! Such an interpretation of this statute, it seems to us, is quite impossible.

The true view of this statute is, we think, that, for all offenses committed against Federal law this statute was designed to stand for a definition of infamy. So standing it makes every offense, throughout the United States, which may be followed by imprisonment in the penitentiary, to be infamous. It is not, therefore, to be interpreted as a mere *local* statute, but as one affecting the entire body of the Federal criminal law, by means of its binding definition of this word "infamous."

We now turn to some considerations, outside of the question of infamy, covered by questions 1 and 2 submitted by the Circuit Court. In our estimation the brief of our associate, Mr. Richburg, upon the points that we now come to, as well as those which we have gone over, contains a quite sufficient discussion of them all, and we feel, in view of this fact as to the fullness of his brief, inclined to largely leave the discussion of questions 3, 4, and 5 to what is found in that brief. And yet, as associate counsel, we would, perhaps, not be justified in wholly omitting to consider these three last questions of the Circuit Court.

We therefore proceed now to make some suggestions in regard to them.

The first proposition which we state now is one which we submit in answer to questions 4 and 5 alike. We condense that proposition now into the following sentence. Since no averment is contained in any count of this information, declaring, either directly or indirectly, that the overt acts charged, in any one of such counts, were *not* acts "exclusively" affecting the election of State officers, and since moreover it is true, as a matter of law, that any act or acts of State officers or other persons, done or omitted in regard to a State election, where also members of Congress are being elected, and which acts so done or omitted affect "exclusively" the election of State officials, are not cognizable, and cannot constitutionally be made cognizable, in the Federal courts, therefore this last class of acts or omissions, so affecting exclusively the election of State officials, constitutes an implied exception to the acts described in sections 5511 and 5512 of the Revised Statutes, as acts made criminal by these two last named sections; and hence no information or indictment, under section 5440, is good where the overt acts conspired to be done come within either section 5511 or 5512, and where the indictment or information *fails* to aver that the overt acts done, or attempted, in pursuance of the conspiracy were *not* of the description affecting exclusively the election of State officers—or where the indictment or information fails to aver that the overt acts did affect, or were meant to affect, a Representative's election.

One part of our proposition, now stated, is very explicitly indicated in the opinion of this court in *ex parte* Sibold, (93 U. S., 393,) in the following words:

> "We do not mean to say, however, that for any acts of the officers of election, having *exclusive* reference to the election of the State or county officers, they will be amenable to Federal jurisdiction; nor do we understand that the enactments of Congress now under consideration have any application to such acts."

In the last part of this sentence we have the explicit declaration of the court that the enactments contained in

Sections 5511 and 5512 have no application to any act done by an officer of election or "other person," in a State election where a Congressional Representative is being elected, which acts have "exclusive" reference to the election of State officers. Thus it is authoritatively determined and is settled law that there are many acts done by officials and others, in such elections, which are not within the statute—which are excepted, in other words, from the purview and scope of the Federal law. And see also U. S. *v.* Nicholson, 3 Woods, 215.

For illustration: it is the duty of the county clerk to ascertain and certify who is elected. (Sec. 73.) Suppose one of these clerks should certify A elected to the Senate of Illinois, when, in fact, B was elected. He changes no paper, commits no forgery, fraud, larceny, or other wrong, except the single one of certifying A elected when B was elected to the State Senate. Is it possible that Congress *could* take cognizance of *this* act of wrongful proclamation or certificate, make it punishable as a crime against the United States? or, if Congress *could* do so, is it possible that these sections will be held to mean that Congress *has* done so?

Or suppose the county clerk were called upon, in a contest in the Legislature regarding a seat in the Senate or House of Representatives, for a certified copy of the election returns, and he should refuse to furnish such returns. Is it possible that *this* refusal *could* be defined, or has been defined, as a crime by an act of Congress and punished as such in the Federal courts? Of course not. It is therefore quite plain that these acts of Congress, as found in Sections 5511 and 5512, do exclude from themselves effectually and absolutely, in the way of implied exception, all acts of officers, though coming within the letter of the description contained in these sections, which affect "exclusively" the election of State officials.

Thus we are brought next to the direct and vital question whether an indictment or information must take note and account, in its averments, of these *excluded* classes of acts which are not within the purview of the Federal statute?

It seems to us that the answer to this question is quite easy, and is manifestly in the affirmative.

One legal element which goes to the support of this affirmative answer is recently made very familiar to the profession by such cases, adjudged in this court, as the U. S. *v.* Simmons, (96 U. S., 360, 362 *et seq.*,) and the case of the U. S. *v.* Carll, (105 U. S., 611 to 613, inclusive.) That element is that it is not sufficient to set out, in the indictment or information, a description of the offense in the language of the statute, unless the description contained in the statute is one which embodies every essential element of the crime intended to be defined and punished.

Stated in other words, this legal proposition is this: Where a statute will be construed, taking all its words together, to require certain elements to be present in order to constitute a crime, but which elements are not all *expressly* stated, and only are implied, there the indictment must affirmatively set out the acts or facts so implied by the statute as requisite to constitute the offense. Otherwise it is bad.

Justice Gray in the last-named case (105 U. S., 612) expresses this in the following words:

> "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth *all* the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the Legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that *intent*. United States *v.* Cruikshank, 92 U. S.,

542; United States *v.* Simmons, *id.*, 360; Commonwealth *v.* Clifford, 8 Cush., (Mass.,) 215; Commonwealth *v.* Bean, 11 *id.*, 414; Commonwealth *v.* Bean, 14 Gray, (Mass.,) 52; Commonwealth *v.* Filburn, 119 Mass., 297."

Applying this authority, now, to the present case, it signifies this: that since, as has been shown, it is the "*intent*" of these sections, 5511 and 5512, to exclude from their operation all the acts, described therein, of officers which "exclusively" affect the election of State officers, therefore the averments of the information must bring the accused within this specific "intent." This the information must do "without any uncertainty or ambiguity." and do "fully, directly, and expressly." (105 U. S., 612.)

Or stated in other words, the information must aver that the acts described in each of the counts, as those done in furtherance of the conspiracy, were *not* acts affecting or intended to affect "*exclusively*" the election of State officials—or if not this averment, then the equivalent one averring that the act was one which did affect, or else, and at least, that it was one that was intended to affect the election of a Representative to Congress.

This particular principle, now under consideration, of the law of indictments, really comes within another very familiar and thoroughly settled rule of criminal pleadings. The rule is this: that where a statutory definition of a crime excepts from the general class of acts made criminal certain acts falling within the general definition, and this exception appears in the definition itself, there the indictment must set forth that the acts being prosecuted are not within the exception.

We have seen that there are classes of acts which though within the general words of sections 5511 and 5512 are yet meant to be excluded from the sections. Such excepted class being all acts exclusively affecting the election of State officers. Therefore in framing an indictment or information under these sections it is as essential to take notice of the excluded or excepted class as if the exception were contained in express words in the definition of the offense. That an *implied* exception stands on the same ground as an express one, *where implied in the definition of the offense,* this court has, in effect, declared in U. S. *v.* Mann, (95 U. S., 583.) There the court uses this language:

> "Where there is no substantial departure from that requirement," (following the words of the statute,) "the information, like the indictment, is in general sufficient, except in cases where the statute is *elliptical,* or where by *necessary implication* other constituents are component parts of the offense. Offenses created by statute, as well as offenses at common law, consist, with rare exceptions, of more than one ingredient; and the rule is universal that every ingredient of which the offense is composed must be accurately and clearly expressed in the indictment or information, or the pleading will be held bad on demurrer. United States *v.* Cook, 17 Wall., 168; 1 Bishop, Cr. Pro., (2d ed.,) sec. 81; Archb. Cr. Pl. & Ev., (18th ed.,) 54."

This brings the case, therefore, within such cases as the United States *v.* Cook, (17 Wall., 168,) where the court says:

> "Where a statute defining an offense contains an exception, in the enacting clause of the statute, which is so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted, the rules of good pleading require that an indictment founded upon this statute must allege enough to show that the case is not within the exception."

Otherwise, if the exception is a totally distinct part of the statute and no part of the definition of the offense.

In the latter case, if it be claimed that the acts charged come within the exception, that is a matter of defense.

These considerations and authorities, we submit, establish that the 3d, 4th, and 5th questions of the Circuit Court must be answered in the negative.

We now turn to a specific consideration of the third question submitted by the Circuit Court. (R., 103, 104.)

In answering this third question in the negative, as we submit it must be answered, we do not forget what we have hitherto in the argument urged, namely, that these acts of Congress commented upon in Karsdendick, *supra*, have, in the respects which we have named, "adopted" the laws of Illinois prescribing the discipline, treatment, and punishment attached by the laws of that State to sentences of imprisonment in the penitentiary.

We furthermore concede, for the purposes of the present point, that the acts of the State Legislature which Congress has thus, for the purposes of Congressional elections, "allowed to stand," (100 U. S., 388,) are, for the purposes of Section 5440, adopted by Section 5539.

We furthermore concede, for the purposes of the present discussion, that it is the duty of the State officials who, under the laws of the United States, are charged with that matter, to deposit in the county clerk's office the returns showing the votes for Representatives in Congress.

And we further concede that these returns of the votes for Representatives in Congress are documents valuable in, and essential to, the right determination of the election of such Representatives.

But we insist, in full view of all these concessions, that for the purposes of this prosecution such concessions are totally insignificant. They are immaterial for the palpable reasons which we now state:

1. That by Section 5440 the *only* overt acts (outside of the matter of frauds named in that section) which that section suffers to be averred and proved, are such overt acts as some act of Congress makes to be "*offenses*" against the laws of the United States. And there are no "offen-

ses" against the United States save such as are created by act of Congress.

2. No act of Congress has made it an "offense" against the laws of the United States to interfere with or despoil the official records of the State of Illinois deposited in the county clerk's office.

Stated in another way the proposition amounts to this: Nothing comes within the meaning of the word "offense," as found in Section 5440, which cannot be prosecuted as a crime in the courts of the United States; and if the county clerk of Cook county be an "officer" within the meaning of that word as found in Section 5403, and if his office be an "office" within the meaning of that word in said last-named section, and if the election returns are "papers, documents, or records" within the meaning of these words in that Section 5403, then the county clerk can be indicted in the United States courts under Section 5403.

And if such clerk can be convicted under Section 5403 in the United States courts, then manifestly and undeniably he can be equally indicted, prosecuted, and convicted in the United States courts under Section 5408. This section reads as follows:

> "Every officer having custody of any record, document, paper, or proceeding specified in Section 5403, who fraudulently takes away, or withdraws, or destroys any such record, document, paper, or proceeding filed in his office or deposited with him, or in his custody, shall pay a fine of not more than two thousand dollars, or suffer imprisonment at hard labor not more than three years, or both; and shall, moreover, forfeit his office and be forever afterwards disqualified from holding any office under the Government of the United States."

If, then, a county clerk be an "officer," and if his office be an "office," and if the county records there deposited be "records" within section 5403, then they are equally so within section 5408; and if a county clerk can be prosecuted and convicted, in a United States court, under section 5403, then so equally can he be prosecuted and convicted under section 5408 in a United States jurisdiction.

All this is simply self-evident. Section 5403 and section 5408 are correlatives. They go together, and for the purposes of this discussion they are one act of Congress.

Now what is the logical consequence of the proposition that a county clerk may be convicted under section 5408? It is manifestly that he *must* be *sentenced*, by the court, *to removal from office* The punishment of removal from office, by that section, is not left discretionary with the court, but is affixed peremptorily and absolutely to every conviction under the section.

We are thus driven to the result that if 5408 takes in county clerks and the records and documents and papers named in section 5408, and if conviction in Federal courts may be had under that section, then the Federal courts must pronounce judgments of removal from this *State* office.

This, it seems to us, is clearly a reduction of the construction of this section, which we resist, to the absurd. It will hardly be contended by the Government that *such* a sentence can be pronounced in a Federal court.

And now carefully observe that the present point is *not* at all as to the question how far it is *competent* for Congress to go in making *State* officials United States officers for designated purposes, nor as to how far such Congressional legislation *may* go in punishing such State officials under acts of Congress for violations of some law of the *State* which Congress has "adopted" as a United States law. On the contrary, the true and only question now is, whether it is the true *design and purpose* of Congress, in sections 5403 and 5408, to undertake to make it a *crime* against the United States for a State officer to violate a duty imposed by the laws of his State in regard to the custody of these election returns. What in law and fact has Congress done in this regard?

It may very well be that the act of Congress does impose a *duty* on the clerk in regard to returns affecting Congressional Representatives, and yet the laws of the United States not undertake to punish as a *crime* an act of the clerk in failing to discharge such duty. It may well be the purpose of Congress to leave such Federal duty of the clerk to be enforced, so far as *criminal* prosecution is concerned, under the State laws. And this is precisely what Congress *has* done in regard to the custody by State officials of these returns.

We submit, therefore, that Congress has not attempted in this legislation to *punish as a crime* the acts named in the 6th & 7th Counts under Sections 5403 and 5408.

It is proper here to guard against misapprehension. We do not concede or believe that it is *competent* for Congress, as against the legislation of the States, to force upon State officials duties to the Federal Government, and to punish as crimes the violation of such duties. It is only because of the assent of the States, as explained in *ex parte* Seibold, that State officers have Federal duties, and act in conjunction with Federal officers in State elections where Representatives to Congress are elected. Such cases as Kentucky *v.* Dennison, 24 Howard, 97, The Collector *v.* Day, 11 Wall., 113, and the cases there brought into notice, show how solicitous this court has ever been to avoid collisions between State and Federal authority, and how impossible it is for the Federal Government without the assent of the States to "impose upon State functionaries any obligatory burdens or duties, and *a fortiori* how impossible to punish as crimes official acts of officers of the States." In the light of such cases as these we deny that it would be competent for Congress to make official acts of State officers done under State laws to be crimes against the United States.

But even if we are wrong in this, still it seems quite impossible that we should be wrong in supposing that it is not the *intent* of Sections 5403 and 5408 to include *State* officers and *State* records within their provisions.

We turn now to some further consideration of the 4th and 5th counts of the information. The 5th question of the Circuit Court asks whether these two counts constitute a conspiracy to commit an offense against the United States under Section 5511 of the Revised Statutes. The 4th count is one the substance of which is a charge that the defendants Mackin, Gallagher, Gleason, and Biehl conspired to "*interfere with*" Ryan, the county clerk, and the two justices who should make the canvass, in the discharge of the duties of said Ryan, clerk, and of such two justices, the conspiracy being to mutilate, &c., the certificate on the tally list, and to remove the tally list, and to substitute in its place a spurious tally list; and to effect the object of the conspiracy, did mutilate the tally list, &c.

The fifth count of the information is based upon the same Section 5511, and differs from the 4th in that it charges a conspiracy by the same Mackin, Gallagher, Gleason, and Biehl to remove and destroy the ballots, the poll book, and tally list, and thereby "interfere with" the said clerk in the discharge of his duties. The pith of each of these counts, 4 and 5, is in charging a conspiracy to "*interfere with*" Ryan, an officer of the election, in the discharge of his duties, and in doing named acts in furtherance of the conspiracy.

The contention of the plaintiffs in error, in regard to the insufficiency of these counts, in addition to the ones already above stated, is found in the fact that the clerk, Ryan, is not an "officer of election" within the meaning of Section 5511. A careful inspection of this Section 5511 will vindicate this contention of the plaintiffs in error. The words material, for the present point, of this section are, "if, at any election for Representative or Delegate in Congress, any person " * * * "*interferes in any manner with any officer of such election in the discharge of his duties*, or by any such means, or other unlawful means, *induces any officer of election, or officer whose duty it is to ascertain, announce, or declare the result of any such election, or give or make any certificate, document, or evidence in relation thereto*, to violate or refuses to comply with his duty or any law regulating the same," * * * " he shall be punished by fine," &c.

Now please, in view of these words of the statute and of the charges of these two counts, observe the following things:

1. That, in each count, the gravamen of the accusation is in the words " unlawfully did conspire together * * * *to interfere with* one Michael Ryan, then and there being county clerk of Cook county," etc. In each count, then, the conspiracy is found in the agreement to "*interfere with*" Ryan, the clerk, in the discharge of his duties.

Now, in section 5511 the clause prohibiting "interfering" is *confined* to " any *officer of such election*." If, therefore, within the meaning of this section, Ryan was not an " officer of election," but was some *other* kind of an officer, then each count is manifestly bad. Then notice:

2. That, in the next clause of this section another class of officers is mentioned than " officers of election," and this other class is called an " officer whose duty it is to ascertain, announce or declare the result of any such election or to give or make any certificate, document, or evidence in relation thereto."

That is to say, the only " interference with " here spoken of and prohibited is interfering with an " officer of election," and no other kind of an officer is mentioned as the subject of the prohibition against being " interfered with."

Then the next clause following the semi-colon, coming after the words " his duties," is another *distinct* prohibition.

It is a prohibition against procuring voluntary action of the officers named in this succeeding clause. It says:

> "Or by any such means, or other unlawful means, *induces* any officer of election, *or officer whose duty it is to ascertain, announce, or declare the result of any such election.*"

In this clause, therefore, it is seen that an officer of election is mentioned as one prohibited to be "induced," etc. Then follows this word "officer" again, but with the words "of election" carefully dropped. He is also here prohibited from being "induced." But as to *this* "officer," where the words "of election" are dropped, he is spoken of as one whose duty it is to ascertain, announce, or declare the result of the election.

Literally and expressly, therefore, the "officer" here described as the one "whose duty it is to ascertain, announce, or declare the result of the election, or to give or make any certificate or document or evidence in relation thereto," is described as "officer" merely, as distinguished from an "officer of election." This is done by omitting the description "of election," which is attached to the word "officer" in the other parts of the section; and such officer, so charged with the duty of ascertaining and declaring the result, etc., is not described as an "officer of election," but as simply "an officer." As to such officer, to wit, the one not described as an officer of election, there is, in this section, no prohibition in regard to his being "interfered with." That this description of the officer whose duty it is to ascertain, announce, or declare the result, etc., describes the clerk of the court, is simply manifest. These are his statutory duties, and here he is distinguished from an "officer of election" by being called simply an "officer." Thus it is made plain as words can make it that section 5511 distinguishes between an officer whose duty it is to canvass returns and give certificates, etc., (which officer is the clerk,) and the "officer of the election," who is prohibited from being interfered with.

As to the "officer of election," there is a prohibition against his being interfered with, and also a prohibition against his being "induced" voluntarily to neglect or violate his duty. But as to the "officer" not described as an officer of election, the prohibition is *confined* to his not being "induced" to voluntary action in disregard of duty.

Thus it is, we think, made quite plain that the section itself distinguishes between an "officer of election," and an "officer" who is *not at* the election at all, but whose duties are to make canvass of the returns, certify results, etc. It is quite unnecessary, therefore, to resort to *general reasoning* upon the proposition that the clerk, for the purposes of this statute, is not an "officer of election." The statute itself makes him something else than an "officer of election," to wit, an "officer." And to make it plain that he is some *other* kind of officer than "officer of election," the statute not only drops the words "of election" here in speaking of the clerk, but carefully describes his functions, and which functions are the very ones discharged by the clerk alone, and are not those done by the officers who *conduct* the election.

But, in addition to, and aside from, what is thus made plain by the statute itself, it is proper to add what we now do.

In the case of United States *v.* Clayton, (2 Dillon, 219,) the indictment was framed under the 22d section of the Act of 1870, (16 Stats. at Large, 145,) and that section made it an offence for "any officer of any election at which any Representative or Delegate in Congress of the United States shall be voted for, whether such officer of election be appointed or created by or under any law or authority of the United States, or by or under any State, Territorial, District, or municipal law or authority, to neglect his duty," etc., "or fraudulently to make any false certificate," etc. The question was there whether Clayton, the Governor of Arkansas, was "any officer of election" within the meaning of these words in section 22, and the court held that he was not. In reaching this conclusion the judge insists that where words are used in a statute which are not technical or words of art, the presumption is that they are used by the Legislature in their ordinary, popular or general signification, unless the contrary appears from the context. The court says:

> "For these reasons, whose cogency is obvious, the law is *settled* that, in construing statutes, the language used is never to be lost sight of, and the presumption is that the language is used in no extraordinary sense, but in its common, every-day meaning."

And he then proceeds to show that the words "officers of election" in their common, popular signification always include only those who participate at and in the election itself, and does not take in officers whose duties come after the election is over, and relate to ascertaining and certifying the result thereof, and preserving the evidence thereof.

With much force the learned judge there enforces the danger resulting from giving to the common, untechnical language of the people as found in such statutes some other senses and significations than those known to the people, and thus bringing about the creation of constructive offenses. After stating this, he adds:

> "These principles of law admit of no dispute, and have been often declared by the highest courts, and by no tribunal more clearly than the Supreme Court of the United States. (United States *v.* Morris, 14 Pet., 464; United States *v.* Wiltberger, 5 Wheat., 76; United States *v.* Sheldon, 2 Ib., 119.)"

To this entire opinion of Judge Dillon, as a most enlightened and well considered one, we respectfully ask the attention of the court.

FEBRUARY 24TH.

We had concluded the foregoing brief, and the same was in the hands of the printer, at the time of our receipt of the brief, on behalf of the Government, presented by Messrs. Hawley & Tuthill.

The time, therefore, at which that brief was received, being so near to the day fixed for the hearing in this court, excludes the possibility of any extended notice of its contents. We have carefully read all that part of it which is an arraignment of the decision of this court in *ex parte* Wilson, and have also, in the main, read the residue of the brief; and we find that, with the exception of the part devoted to *ex parte* Wilson, it is, in substance, a reproduction of the printed briefs, for the Government, filed in the Circuit Court. For this reason it is, perhaps, not important, to the plaintiffs in error, that we have not sooner seen this argument of the Government's counsel. We trust that we will be pardoned for being of opinion that this brief, though conspicuous for the learning it displays, and more conspicuous for the industry it exhibits, is nevertheless still more remarkable for its frailties in the direction of carefulness and accuracy.

In regard to these last two qualities of the brief, it seems to us that to point out a few examples, bearing upon this matter, especially if vital examples, furnish about as adequate a reply to the entire law and doctrines of the brief as would be furnished by a more extended review.

This is so upon the principle stated of the maxim—"*ab uno disce onmes.*"

Take, as an example of the carefulness of this brief, the use which is made of the case of Waddell (112 U. S., 76,) which is dealt with (p. 21, &c.,) as if this court had in that case distinctly decided that it was the nature of the crime, as distinguished from the nature of the punishment, which determined the question of its infamy; and the brief refers to the Waddell case as being in harmony with the

District and Circuit Court decisions holding this way, (bottom of p. 21, top of p. 22;) whereas the Waddell case is one in which this court not only *decides* nothing at all upon that point as to which it is that makes the infamy, but is one in which the court explicitly *states* that nothing is decided upon the subject of infamy; and the court expressly refuses to decide anything, because nothing was presented to the court for decision on that point; and it sends the case back with that question untouched on purpose "that the question whether the case can be prosecuted by information may be raised in an appropriate manner," (pp. 82, 83.)

And yet the brief relies upon this case as one which, upon this point, is out of harmony not only with *ex parte* Wilson, but as one "*which is in harmony with the numerous decisions of the District and Circuit Courts of the United States on the subject.*"

But let us take, as an example of the lack of accuracy in which, as seems to us, this brief abounds, the statement found on page 14, where this sentence will be seen:

> "In this court, in the case of Wilson, it was held, for the first time by any respectable court, that the framers of the Constitution intended the words used to refer to punishment, and not to crime."

This remarkable sentence does not, of course, mean that this court has put itself out of the pale of respectability by its decision in the Wilson case, but it does mean that the doctrine of the Wilson case is so novel and astounding and absurd as that judicial respectability has, from the beginning of the Government, shrunk from its utterance. Now, as displaying the accuracy of this statement, that the doctrine of *ex parte* Wilson was never uttered until uttered in this court in that case, let us see.

It is probable that the learned counsel for the Government would, themselves, admit Chief Justice Shaw and his court into the class of "respectable." In an opinion, by that Chief Justice, which is recognized by every court in this country as one of the most important and most illustrious ever pronounced by him, this very point, which the brief says was never before decided, by any respectable court, as *ex parte* Wilson decides it, came before the Supreme Court of Massachusetts for solution and for judgment. It was the *only* question which came before that court for judgment in that case. In reaching the judgment of the court the Chief Justice found it material to trace the origin and history of the 5th amendment to the Constitution of the United States. He finds that this 5th amendment was, in the Massachusetts convention, proposed by John Hancock, the president of the convention, and was advocated by Governor Bowdoin and other members, and then gives the 5th amendment as it was adopted and as it appears in the Constitution.

He then, in reaching the meaning of the words "infamous punishments," as found in the 12th article of the Massachusetts bill of rights, further proceeds to show that it must have attributed to it the *same* meaning as the words "infamous crimes" have, as found in the 5th amendment to the Constitution of the United States. He, in dwelling upon this point, says:

> "It is the more significant when we consider that it (the 5th amendment) originated in Massachusetts a few years later" (than the equivalent provision in their bill of rights), "and was adopted by nearly the same set of public men."

Then, after quoting from Mr. Dane the statement that the amendment to the Constitution of the United States and the equivalent provisions of the State constitution prohibit, from infliction, infamous *punishments*, he proceeds to say:

> "Thus it appears that Mr. Dane, eminent both as a statesman and a jurist, and who was a contemporary with

the authors of the Constitution, *puts the* SAME *construction upon the Massachusetts bill of rights and the amendment of the Constitution of the United States.*"

After the Chief Justice had thus shown that the words "infamous punishments" in the Massachusetts bill of rights, and "infamous crimes" in the 5th amendment, mean the "*same*" thing, he then proceeds to show that these words in both instruments make the infamy to reside in the *character of the punishment* endured by the convict. He makes these two terms to be equivalent and convertible terms. His words are (p. 34):

> "Then comes the practical difficulty, as before suggested, in ascertaining, in particular cases, *what are infamous punishments; or, in other words, what are infamous crimes and offenses.*"

Having thus made the two expressions of the two instruments exact equivalents, in signification, he proceeds to show, in the judgment to which this court has just given its imperial sanction, that the infamy spoken of in each instrument is to be found in the consequences endured by the convict in the way of punishment.

Again. We, in the District of Columbia, have regarded the Supreme Court of that District as respectable, and its Chief Justice eminently so. That court, in the case of United States *v.* Cross, (1 MacArthur, 152, 153,) already cited above, in determining the question of the infamy or non-infamy of a crime, after declaring, as above quoted, that the almost universal test of infamy, adopted by the legislation of the States of this Union, is the "walls of the penitentiary," proceeds to declare (p. 153):

> "The infamy of an offense, which under the law rests in legislative authority, *as* expressed *in the penalty of the law*, *may* change, and necessarily *does* change, the penalty of the law."

This is a case distinctly holding that the "penalty" determines the question of infamy under the 5th amendment.

Again. Justice Cox and his Court, of this District, belong, as we regard, to the respectable courts of the country. In the case of United States *v.* Brady, cited *supra*, as we have seen, it was distinctly held that the question of infamy under the laws of the United States and its Constitution depends upon the character of the punishment inflicted.

Again. For the purposes of the present point, as to what makes a crime infamous, the Congress which passed the act of the 17th of June, 1870, (16 Stats., 153,) which we have quoted above, was a most "respectable court." On such a point it is made respectable for several reasons:

One is that what Congress undertakes to declare to be the meaning of this word "infamous" is, by the very force of the declaration, made to be its true meaning, right or wrong.

Another reason why this Congress, upon *this* point, is made respectable for the purposes of this inquiry, is that one of the learned counsel for the government, whose brief we are noticing, was himself a member of that Congress, and aided, no doubt, in giving the definition of "infamy" there found.

In harmony with these examples, taken from the Circuit Courts, and from the Supreme Court of Massachusetts, holding that the infamy is to be found in the nature of the punishment, is the language of one of the highest living authorities upon such questions in this country.

Judge Cooley, in his "Principles of Constitutional Law," says, speaking of the 5th amendment:

> "It is probable that, in this amendment, the *punishment was in view as the badge of infamy, rather than any element in the offense itself*, and that provision for the punishment of minor offenses otherwise than on indictment, even though they be degrading in their nature, would not be held un-

constitutional, *provided* the *punishment* imposed was not greater than that usually permitted to be inflicted by magistrates proceeding in a summary way. *But punishment in the penitentiary must always be deemed infamous*, and so must any punishment that involves the loss of civil or political privileges."

And the same thing is stated by Judge Pascal, in his Annotations upon the Constitution, p. 258, in these words:

> "Usually, in this country, it" (the infamy of the fifth amendment) "means such as are punished with death or *imprisonment in a State prison or penitentiary*."

We might indefinitely multiply citations like these, but need not. We have given the above with no view of vindicating *ex parte* Wilson, for that would be out of place here, but only for the purpose of indicating that the opposing brief has fallen into inaccuracies *generally*.

In regard to the entire body of this attack upon *ex parte* Wilson it seems to us that two or three additional suggestions are sufficient and not out of place.

We, of course, have no apprehension that, in this case, the court will either reverse or modify or question the full and complete accuracy of every part of the court's holding in that case. Still, counsel will be pardoned for making some suggestions in reply to this rather remarkable criticism of this decision.

The whole pith of the criticism is based upon the proposition that the court is wrong when it says that the infamy "depends upon the consequences to himself if he shall be found guilty," (100 U. S., 428,) and does not, in the main, or primarily, depend upon the consequences, to society, of the crime. And the struggle of the brief is to show that the Constitution, in the 5th amendment, in its use of this word "infamous," had exclusively in mind the nature of the act or crime, as such acts or crimes were *estimated* in England and its provinces, at and before the making of the Constitution, and was, in no degree, based upon a purpose to secure the beneficent interposition of a grand jury, in the interest of protection and humanity, to each citizen before he should be publicly accused of and tried for crime, where the *mere accusation and trial* would render him and his family outcasts.

This court has, in *ex parte* Wilson, taken the view that the *protection and humanity* found in the interposition of a grand jury were the main purpose of the 5th amendment, and took the further view that the thing meant by the word "infamous" is that degradation of the citizen, as the result of trial and conviction, which degradation, as the consequence of particular acts, is an ever-shifting and varying one, and that the nature of the act done, as distinguished from the punishment affixed by the law, was not the quality primarily meant by this word "infamous."

Look, for a moment, at the consequences of holding that, in our Constitution, this word "infamous" was used in the sense attributed to it by this brief, namely, that acts regarded as infamous by the laws of England, and only those, (with the addition of ones newly created by Congress,) shall still be held to be acts deemed infamous by the 5th amendment.

In the early periods of the English people, as is declared by one of the most eminent of her writers upon this subject in that country, murder, robbery, arson, rape, and other kindred acts were not only not crimes at all, but were virtues; and the same authority rather strikingly adds that this very word "virtue," in the change of its signification, in various languages, is a remarkable index of the changed opinions of mankind in regard to what acts are "infamous." "Virtue," which now signifies not only obedience to law, but pre-eminently the highest purity in the character of woman, primarily signified, in England, the "virility" or "bestiality" of men.

In England, for long ages, seizures of estates and lands by violence and robbery, in virtue of the rule that "might made right," was the very source of title, and "seizen" was an indispensable muniment of title. These acts which were then "virtues," now are, and long ago became, "infamous crimes." At still later periods in the history of English law, which the brief makes the standard of moral quality for our Constitution and law, and coming down even to and beyond the period of Sir Matthew Hale, we find certain three grades of offenses which were crimes at common law and felonies by the Statute of First James, (1 Hawk. P. C., 6 ed., c. 3, sec. 4,) namely:

1. The act of endeavoring, by force of magic, to "raise the devil," and compelling him to do the bidding of the actor.

2. The act of securing the agency of the devil by friendly conference.

3. The act of producing strange effects, above the ordinary course of nature, by means of charms and forms of words!

At common law, to speak contemptuously of the established Church, of the doctrine of the Trinity, or other tenets of the established religion, was a crime punishable by infamous corporal punishment. (1 Hawk. P. C., c. 5; 2 Lewin, 287.)

By the English law, (1 Eliz., c. 2,) for a minister to speak in derogation of "the Book of Common Prayer" was a crime punishable by imprisonment for the first offense, and and for the second offense by imprisonment for life.

It would not be useful for us to multiply, as we might do indefinitely, these examples in regard to what the English law classified as crimes, or as imfamous crimes.

To say that the fifth amendment had in mind the anti-constitutional estimate of the English people of the *quality of the acts* which the law made criminal, and that this estimate is, in any material degree, to be made the standard of infamy in this country, is, we submit, reducing the fifth amendment to unalleviated folly. What was criminal in one age, in England, became virtues in another. What were virtues in one age became felonies in another; and so it has been, and will forever be, according to the shifting conditions and opinions of virtue, morality, intelligence,—in short, of civilization itself.

It was for this reason that the fifth amendment designed, as this court held it did design, to look, in determining the question of infamy, to the *consequences*, of accusation, trial, and conviction, to the citizen, and to allow these consequences to be looked to, in each successive generation and age. The idea of the amendment manifestly is one proceeding from motives of *humanity* and of protection of human rights. The amendment is in the family of provisions entitled "the bill of rights." They are all addressed to the security and protection of the citizen in life, liberty, and property. To say, therefore, of this fifth amendment that it is not primarily addressed to the matter of *protection*, and does not, as this court says it does in *ex parte* Wilson, look primarily to the consequences, to the accused, of *being accused and tried*, and to say, on the other hand, that in determining whether there shall be a grand jury, it looks to the question as to how the English people estimated the moral qualities of an act one hundred or one thousand years ago, is to deprive the amendment of every essential purpose in which it found its origin.

We here suspend the argument in the form of brief, and, so far as we are concerned, will leave its omissions to be supplied, if at all, in the oral discussion.

SAMUEL SHELLABARGER,
J. M. WILSON,
Of Counsel for Plaintiffs in Error.

117-348

Office Supreme Court, U. S.
FILED.
MAR 1 1886
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

October Term, 1885.

JOSEPH C. MACKIN AND WILLIAM J. GALLAGHER, PLAINTIFFS IN ERROR,
vs.
THE UNITED STATES.
No. 924.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Brief for the United States.

Supreme Court of the United States.

OCTOBER TERM, 1885.

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ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Brief for the United States.

This is a criminal information filed in the district court of the United States for the northern district of Illinois against the plaintiffs in error and others under section 5440 of the Revised Statutes, which is as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than two years.

Seven different acts of conspiracy are charged, involving criminal designs touching a general election held in the State of Illinois on the 4th of November, 1884, for Representatives in the Congress of the United States and certain State officers.

The first three counts of the information (R., pp. 8–12) charge a conspiracy to violate section 5512 of the Revised Statutes, which is as follows:

> If, at any registration of voters for an election for Representative or Delegate in the Congress of the United States, any person knowingly personates and registers, or attempts to register, in the name of any other person, whether living, dead, or

fictitious, or fraudulently registers, or fraudulently attempts to register, not having a lawful right so to do; or does any unlawful act to secure registration for himself or any other person; or by force, threat, menace, intimidation, bribery, reward, or offer, or promise thereof, or other unlawful means, prevents or hinders any person having a lawful right to register from duly exercising such right; or compels or induces by any of such means, or other unlawful means, any officer of registration to admit to registration any person not legally entitled thereto, or interferes in any manner with any officer of registration in the discharge of his duties, or by any such means, or other unlawful means, induces any officer of registration to violate or refuse to comply with his duty or any law regulating the same; or if any such officer knowingly and willfully registers as a voter any person not entitled to be registered, or refuses to so register any person entitled to be registered; *or if any such officer or other person who has any duty to perform in relation to such registration or election, in ascertaining, announcing, or declaring the result thereof, or in giving or making any certificate, document, or evidence in relation thereto, knowingly neglects or refuses to perform any duty required by law, or violates any duty imposed by law, or does any act unauthorized by law relating to or affecting such registration or election, or the result*

> **thereof, *or any certificate, document, or evidence in relation thereto,* or if any person aids, counsels, procures, or advises, any such voter, person, or officer to do any act hereby made a crime, or to omit any act, the omission of which is hereby made a crime, every such person shall be punishable as prescribed in the preceding section.**

The gravamen of these counts is that Mackin, Gallagher, Gleason, and Biehl, and others unknown, conspired:—

1. To violate the sealed package deposited in the office of the clerk of the court of Cook County, containing the return of said election for the second election district of the eighteenth ward of the city of Chicago, and to mutilate and alter the same, which intention they in fact carried out, with the connivance and consent of Gleason and Biehl, who were deputies of the said clerk, by making the return recite that one Leman received 272 votes for State senator, instead of 420, and by making the return recite that one Brand received 474 votes for State senator in the place of 274, and by destroying the genuine tally-list and substituting a spurious one in its room;

2. To abstract some of the ballots cast at said election district for Congressional representative and other officers, and the poll-book, with the certificate thereon, from the said clerk's office, and substitute spurious ones in their places, and that, with the connivance of the said deputies, this unlawful design was carried into effect;

3. To mutilate and alter the two poll-books with the certificates thereon, and to destroy the tally-list, and destroy ballots cast for Congressional representative and other officers and substitute spurious ones therefor; and that, with the connivance of the said deputies, they carried out their purpose by changing the certificate as to Leman and Brand, as aforesaid, by destroying the tally-list and replacing it with a spurious one, and by having prepared over two hundred false and spurious ballots to be substituted for those it was intended to destroy.

The fourth and fifth counts charge a conspiracy to violate section 5511 of the Revised Statutes, which is in these words:

> If, at any election for Representative or Delegate in Congress, any person knowingly personates or

votes, or attempts to vote, in the name of any other person, whether living, dead, or fictitious, or votes more than once at the same election for any candidate for the same office, or votes at a place where he may not be lawfully entitled to vote, or votes without having a lawful right to vote, or does any unlawful act to secure an opportunity to vote for himself or any other person, or by force, threat, intimidation, bribery, reward, or offer thereof unlawfully prevents any qualified voter of any State, or of any Territory, from freely exercising the right of suffrage, or by any such means induces any voter to refuse to exercise such right, or compels or induces by any such means any officer of an election in any such State or Territory to receive a vote from a person not legally qualified or entitled to vote, or interferes in any manner with any officer of such election in the discharge of his duties, or by any such means, or other unlawful means, induces any officer of an election, or officer whose duty it is to ascertain, announce, or declare the result of any such election, or give or make any certificate, document, or evidence in relation thereto, to violate or refuse to comply with his duty or any law regulating the same; or knowingly receives the vote of any person not entitled to vote, or refuses to receive the vote of any person entitled to vote, or aids, counsels, procures, or advises any such voter,

> person, or officer to do any act hereby made a crime, or omit to do any duty the omission of which is hereby made a crime, or attempt to do so, he shall be punished by a fine of not more than five hundred dollars, or by punishment not more than three years, or by both, and shall pay the costs of the prosecution.

These counts charge that Mackin, Gallagher, Gleason, and Biehl conspired to interfere with Ryan, the county clerk of said Cook County, and any two justices of the peace of said county he might associate with him for the purpose of canvassing the several returns of the said election within said county, by the various mutilations, altertions, and frauds set out in the first three counts.

The sixth and seventh counts charge a conspiracy to violate section 5403 of the Revised Statutes, which is as follows:

> Every person who willfully destroys or attempts to destroy, or, with intent to steal or destroy, takes and carries away any record, paper, or proceeding of a court of justice filed or deposited with any clerk or officer of such court, or any paper or document, or

> **record filed or deposited in any public office, or with any judicial or public officer, shall, without reference to the value of the record, paper, or document, or proceeding so taken, pay a fine of not more than $2,000 or suffer imprisonment at hard labor, not more than three years, or both.**

These counts charge a conspiracy to steal and destroy papers, documents, and records deposited in a public office and with a public officer, being the poll-books, certificates, and ballots deposited in the county clerk's office, as already stated.

The information was tried at the December term of the district court, 1884, and on the 21st of February, 1885, Mackin, Gallagher, and Gleason were found guilty, and Biehl not guilty (R., p. 32), and on the 12th of March, 1885, Mackin and Gallagher were sentenced to imprisonment for two years in the penitentiary at Joliet, Illinois, and to pay a fine of $5,000 each, and stand committed until the same be paid (R., pp. 35,36).

On the 24th of March, 1885, a writ of error from the circuit court of said district was duly allowed Mackin and Gallagher (R., p. 3).

On the 18th of May, 1885, the writ of error was argued in the circuit court before the circuit justice and the circuit judge (R., p. 102), and on the 22d of May the judges announced that they were divided in opinion, and certified to this court the following questions (R., pp. 103, 104):

> 1. Whether the crimes or any of them charged against the defendants in the counts of the information, are infamous crimes within the meaning of the fifth article of amendment of the Constitution of the United States?
>
> 2. Whether the defendants can or not be held to answer in the courts of the United States for the crimes charged, or any of them, against them herein, otherwise than on the presentment or indictment of a grand jury?
>
> 3. Are the papers, records, returns, poll-books, ballots, tally-lists, certificates, or other papers described in the sixth and seventh counts of the information, records, papers, proceedings, or documents such as are embraced by or are described in section 5403 of the Revised Statutes of the United States; and is the county clerk's office of Cook County, Illinois, a public office within the meaning of that section and with reference to the laws of the United States and of the State of Illinois upon the subject of elections?

4. Do the facts stated in the first, second, or third counts of the information constitute a conspiracy to commit an offense against the United States, under section 5512 of the Revised Statutes?

5. Do the facts stated in the fourth and fifth counts of the information constitute a conspiracy to commit an offense against the United States, under section 5511 of the Revised Statutes?

Argument.

Of the questions presented, the one first in gravity is, whether the offenses charged can be prosecuted by information; in other words, whether they are "*infamous*" in the sense of Article V. of the Amendments of the Constitution.

For the first time, the question, what offenses, other than capital, are infamous, and so must be prosecuted by the presentment or indictment of a grand jury, came before this court in *Ex parte* Wilson at the last term (114 U. S., p. 418).

The offenses charged in that case were held "*infamous*" because one of the punishments annexed to them was imprisonment *at hard labor*, and the Court expressly limited the decision to the facts before it.

In the case at bar the punishment prescribed (§ 5440, R. S.) is a fine of not less than $1,000 or more than $10,000, and an imprisonment of not more than two years. Hard labor is not made one of the conditions of the imprisonment, nor does the law designate the place where the imprisonment is to be undergone, further than to leave it discretionary with the Court to direct whether it shall be in a jail or penitentiary if the sentence is for more than a year (R. S., § 5541).

That the Court studiously refrained from a comprehensive definition of the term "*infamous*" in *Ex parte* Wilson (*supra*), confining itself to the facts of that case, may be taken as an indication that it regards the question as still open in all its length and breadth.

Indeed, this would seem to follow logically. The question is a unit. It cannot be treated fragmentarily. It were no more possible to describe a circle without regard to a fixed central point than to discuss the question in hand in any one of its bearings without regard to all. So long, then, as anything remains to be determined to complete the exposition of the term "*infamous*," so long, we are apt to think, must the question of the true sense of that term be considered as entirely open.

In the learned opinion in *ex parte* Wilson the following passage occurs:

> Whether a convict shall be permitted to testify is not governed by a regard to his rights or to his protection, but by the consideration whether the law deems his testimony worthy of credit upon the trial of the rights of others. But whether a man shall be put upon his trial for crime without a presentment or indictment by a grand jury of his fellow citizens depends upon the consequences to himself if he shall be found guilty. (p. 423).

In the next paragraph several references to the Commentaries are given in support of the proposition, that at common law, informations by the Attorney-General, without the intervention of a grand jury, were not allowed for capital crimes nor for any felony; and then it is said by the court, that "the question whether the prosecution must be by indictment, or might be by information, *thus depended upon the consequences to the convict himself.*"

It seems more than probable that the most potent factor in bringing the court to its conclusion was the consideration that it could not have been in the contemplation of the Constitution to disregard the effects of conviction of crime on the criminal himself and look to its effects on third persons for a criterion of infamy.

Now, it is with unfeigned deference that we say that in taking this view the learned court did not sufficiently weigh the consequences to the criminal himself of the destruction of his competency as a witness, or recognize the principle that incompetency from infamy proceeds not from the impairment of credibility, as the result of conviction of crime, but is *punishment* by the divestiture of a valuable legal right. *Ex delicto non ex supplicio emergit infamia.* (Steph. N. P., 1721.)

That a consequence which involves forfeiture of "the freedom and franchise of the law," *libera lex*, rendering one *civiliter mortuus*, in a sense, for if he be an attesting witness, proof may be given of his handwriting (Steph. N P., 1721), and, also, *ex lex*, for he is bereft of the right of every *legalis homo* to defend *se et sua* by his own testimony, is dreadful to a freeman, does not admit of discussion. The possible effect upon third parties of conviction of an infamous offense is insignificant indeed in comparison with its effect upon the criminal himself.

We take leave to enforce these observations by a quotation from an opinion of the late Judge John Scott, of Virginia, whose great vigor and grasp of mind proved him worthy to bear a name so famous in the annals of the English law. Says that eminent judge, delivering the opinion of the general court in a case involving the question whether, under the constitution and bill of rights of Virginia, want of religious belief was a ground of incompetency to testify:

> "It was argued that when a man is rejected as a witness between other parties no right of his is invaded. He suffers neither wrong nor damage by the rejection. He may make an affidavit in a cause in which he is party; swear to a bill or answer in chancery; require surety of the peace; make com-

plaint before a justice of peace, and even give evidence of an assault and battery on himself. All this the most infamous may do. But when he is rejected as a witness in other cases, he has nothing to complain of. Is this so?"

"Every citizen is interested in the due enforcement of the law and administration of justice between man and man. If one who invades the rights of his neighbor is compelled to make amends, it not only tends to prevent a repetition of the wrong by him, but deters others, and so far protects the persons and property of all. Every citizen has an equal right to bring offenders against the criminal laws to justice; and may assume the office of prosecutor on an indictment or information for a misdemeanor. The privileged informer may procure a conviction on his own evidence, whilst the proscribed is sent out of court with the costs upon his back.

"The proscribed man may suffer in his property, or in the persons of the members of his family. His goods may be stolen, his dwelling broken into by the midnight robber, or burned by the incendiary; his child may be beaten, or his wife murdered before his face, and the offender escape because of the incapacity of the injured man to give evidence against him. This very incapacity may have caused the calamity; and can he be told that he lives un-

der a government of equal laws? that he has *suffered* nothing on account of his opinions?" (Perry's case, 3 Gratt., 644.)

It is submitted, therefore, with deference, that to follow the common law definition of infamy is not to make the consequences to third parties, and not the accused himself, the test of whether he must be brought to trial on the accusation of a grand jury.

Upon the point that the incompetency, the degradation from the lofty estate of *legalis homo*, in which infamy consists, is vindicatory and not the outcome of a presumption of moral perversion, we respectfully refer the court to our brief in *ex parte* Wilson, copies of which will be furnished. We also respectfully refer to that brief for the authorities, generally, on the subject of what is an infamous crime.

It is submitted as far from probable that the framers of the fifth amendment intended that the quality of infamy should depend on so mutable and shifting a standard as public opinion, which might be one thing in one State, and another in another.

We submit with great deference that it must be presumed that in using the term "infamous crime," which had a fixed sense at common law, the framers of the amendment intended to employ it that sense. When this court has been called on to define pardon, or due process of law, or unreasonable searches and seizures, or *ex post facto*, or bill of attainder, or bankruptcy or obligation of contracts, or any other common law term used in the Constitution, it has uniformly held that the term so employed must be taken in its common law acceptation. And Mr. Justice Story tells us in his commmentaries on the Constitution that in determining what amounts to bribery and other high crimes and misdemeanors, resort must necessarily be had to the common law, "which is the guardian at once of private rights and public liberties," (§ 797).

Indeed, so strict and literal has been this adherence to common law definitions that in determining the waters over which the admiralty jurisdiction of the United States extended, this court, for many years, held that its limit was the ebb and flow of the tide, *because it was so defined in England*, and the revolution of opinion resulting in the doctrine that *navigability* is the limit of that jurisdiction, is marked by one of the most memorable and animated discussions that have agitated this tribunal. And that revolution in opinion, it may be safely said, could never have been effected unless it had been satisfactorily shown that *navigability* and *ebb and flow of the tide* were, as applied to the rivers and estuaries of England, convertible terms.

In expounding the 5th amendment, therefore, is there any sufficient reason for abandoning this well and long established rule of interpretation, that technical words are to be taken in a technical sense unless it satisfactorily appears that another sense is more agreeable to the object and intention?

Seeing that conviction of an "infamous crime" was followed by loss of "the freedom and franchise of the law," it would seem probable enough that the amendment intended to secure the citizen against this degradation, unless upon the presentment or indictment of a grand jury. The amendment had in view protection from this lowest infamy to which a freeman could sink, in comparison with which the disgrace of hard labor in a penitentiary is small, when unattended by forfeiture of the right to be heard as a witness *se et sua defendendo.*

It cannot be claimed that any of the offenses laid in the several counts of the information are infamous in the sense of the common law.

As to whether any of the offenses charged is infamous when tried by the estimate placed by common opinion on the punishment annexed to it, we do not desire to add to what has been said on that point in the argument filed by our learned colleagues.

We respectfully submit, therefore, that the first question should be answered in the negative, and the second in the affirmative.

The Remaining Questions.

If the offenses laid in the several counts of the information are offenses against the United States, it must be because they relate to subjects as to which there is a concurrency of power between the States and the United States, for if the duties and the official papers or records mentioned in the information are Federal in character they became so by virtue of the laws of the State of Illinois and not by virtue of any act of Congress.

This subject of concurrency of power between the several States and the National Government has given rise to a vast amount of interesting discussion and led to much collision of opinion in this Court, and, it may be safely predicted, will, to some extent, continue to do so.

Now, unless a power is, by the express language of the Constitution, vested exclusively in the United States, as the power to legislate over this District, or is prohibited to the States, as the power to coin money, or is of so particular a character as that it will not admit of exercise by the several States, as the power to regulate inter-State or foreign commerce, the mere fact that it resides in the General Government is not enough to prevent the several States from exercising it in any particular not covered by Federal action. As has been happily said, "It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the States." (Sturges *v.* Crowninshield, 4 Wheat.)

It is a misnomer and a source of much misconception to speak of concurrent powers between the Federal Government and the States. The concurrency so often referred to is only *quasi* in character, for so soon as the Federal Government legislates on a subject the conflicting legislation of every State ceases to have any further effect, although valid up to that time, and the Federal law becomes the supreme law. Now this would not be the case if there was a concurrency of power in the true sense, for then the authority first occupying the ground would hold it *ad libitum*, as is exemplified by the practice between courts of concurrent jurisdiction, which gives the tribunal first obtaining jurisdiction possession of the subject to the exclusion of all coordinate courts.

It is quite safe to say, that without the co-operation of the several States by the exercise of some of these concurrent powers, the difficulties of the new Government would have been seriously increased.

Indeed, it may almost be said that the Constitution furnishes within itself the evidence that its framers calculated on this State co-operation, in the declaration that the Constitution and the laws made in pursuance of it "shall be the supreme law of the land," "for," says Mr. Chief Justice Taney, "if the mere grant of power to the General Government was in itself a prohibition to the States, there would seem to be no necessity for providing for the supremacy of Congress, as all State laws upon the subject would be, *ipso facto*, void, and there could therefore be no such thing as conflicting laws, nor any question about the supremacy of conflicting legislation. It is only where both may legislate on the subject that the question can arise" (License Cases, 5, How., 579). Certainly, the combined evidence of this provision of the Constitution and the action of the new Government, which was shaped, largely, by those who were prominent in the convention that framed the Constitution, does show that this co-operation of the State governments was regarded as important, if not indispensable, to the success of the National Government.

The First Congress committed to the several States, unreservedly, the important subjects of pilotage and quarantine and health regulation, requiring the Federal customs and other officers to co-operate with those of the States in enforcing all regulations on such subjects. Indeed, the National Government has been too glad to abstain from interference with the perplexing subject of port and harbor regulation, and quarantine and health regulation, as calling for too various a treatment to be effectively dealt with by the national legislature. And from the First Congress down, free use has been made of the courts of the States for Federal purposes, such as naturalizing aliens, and enforcing fines and forfeitures under revenue laws. The scattered condition of the population and the difficulties of getting from place to place at the time of the adoption of the Constitution, and for many years afterwards, would have made it burdensome and oppressive to the people to confine jurisdiction in all federal matters to the national courts, besides being certain to add to the already existing disaffection to the General Government.

Indeed, as already intimated, but for many of the powers delegated by the Constitution being coexistent in the States on the one hand and the United States on the other, it would have been doubtful whether our federal polity could be made a success.

The opinion of Mr. Chief Justice Taney in Prigg *vs.* The Commonwealth of Pennsylvania (16 Pet., 626) is full of instructive matter on this head.

And when Congress exerts a concurrent power it only supplants what the States may have done on the same subject, to the extent that the one is inconsistent with the other and no further, for to hold that the General Government could not interfere at all without taking the whole subject out of State hands would seriously impair the usefulness of State action in matters committed to the United States.

And if the act of Congress is in furtherance of and in harmony with State legislation, the two may co-exist, even though the former or both be penal. This has been settled by this court on great consideration, and is no longer an open question (*Ex parte* Siebold, 100 U. S., 373; *Ex parte* Clarke, *ib.*, 399; U. S. *v.* Gale, 109 U. S., 65; Moore *v.* Illinois, 14 How., 13, *and cases cited;* U. S. *v.* Hall, 98 U. S., 343; U. S. *v.* Fox, 95 U. S., 670). And especially is this the case in legislation touching the times, places, and manner of holding elections for Senators and Representatives, the Constitution expressly providing that State laws on those subjects may be suspended or altered by Congress, except as to the places of choosing Senators (Const., Art. 1, Sec. 4).

All that remains open in this case, then, in view of the authorities just referred to, is whether the conspiracies charged had in view offenses against the United States.

Upon this point we refer to the argument of our colleagues.

In that argument will be found (pp. 59–64) the laws of Illinois involved in this case.

A. H. GARLAND,
Attorney-General.
WM. A. MAURY,
Assistant Attorney-General.

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Office Supreme Court U. S.
FILED.
FEB 23 1886
JAMES H. McKENNEY,
CLERK.

117-348

IN THE

Supreme Court of the United States.

October Term, A. D. 1885.

JOSEPH C. MACKIN and WILLIAM J. GALLAGHER

vs.

THE UNITED STATES.

On Certificate of Division from the Circuit Court of the United States for the Northern District of Illinois.

ARGUMENT ON BEHALF OF THE UNITED STATES.

JOHN B. HAWLEY,
RICHARD S. TUTHILL,
Of Counsel.

BARNARD & GUNTHORP, LAW PRINTERS, 44 & 46 LASALLE ST., CHICAGO.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1885.

JOSEPH C. MACKIN AND WILLIAM J. GALLAGHER

vs.

THE UNITED STATES.

ON CERTIFICATE OF DIVISION FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Argument on behalf of the United States.

MAY IT PLEASE YOUR HONORS:

This was an information filed by the district attorney in the District court of the Northern district of Illinois, charging the defendants therein with a conspiracy under section 5440, Revised Statutes, to commit the offenses defined in sections 5403, 5511 and 5512 of the same statutes.

The case was taken to the Circuit court on writ of error and is now brought to this court on certificate of division of opinion between the Circuit justice and the Circuit judge.

The questions now presented for decision by this court are whether the offenses charged are infamous and such as can only be prosecuted by indictment, and whether the several counts of the information set forth sufficient facts to constitute a violation of the sections named or any of them. As certified, the questions are:

"1. Whether the crimes or any of them charged against the defendants in the counts of the information, are infamous crimes within the meaning of the fifth article of amendment of the constitution of the United States?

2. Whether the defendants can or not be held to answer in the courts of the United States for the crimes charged, or any of them, against them herein, otherwise than on the presentment or indictment of a grand jury?

3. Are the papers, records, returns, poll books, ballots, tally lists, certificates, or other papers described in the sixth and seventh counts of the information, records, papers, proceedings or documents such as are embraced by or are described in section 5403 of the Revised Statutes of the United States; and is the county clerk's office of Cook county, Illinois, a public office within the meaning of that section and with reference to the laws of the United States and of the State of Illinois upon the subject of elections?

4. Do the facts stated in the first, second or third counts of the information constitute a conspiracy to commit an offense against the United States, under section 5512 of the Revised Statutes?

5. Do the facts stated in the fourth and fifth counts of the information constitute a conspiracy to commit an offense against the United States, under section 5511 of the Revised Statutes?"

THE INFORMATION WILL LIE.

At the time when this case was tried in the District court, it can hardly be questioned that under the decisions of the Circuit and District courts of the United States, fortified as they were by the common law, there was ample justification for the proceeding by information. Since that time the opinion in the case of *Ex Parte Wilson*, 114 U. S., 417, has been announced, and is claimed by the plaintiffs in error to be decisive of this case, and that under it this court must hold this proceeding to have been irregular and unlawful. Upon the other hand it is respectfully contended that the *case of Wilson* ought not to be sustained as the settled law of this court, and that in any event this case does not come within the rule of law there laid down as applicable to the facts of that case.

In the *case of Wilson* this court held that the fifth amendment declaring that "No person shall be held to "answer for a capital, or otherwise infamous crime, unless "on a presentment or indictment of a grand jury, except "in cases arising in the land or naval forces, or in the "militia, when in actual service in time of war or public "danger," should be construed to mean "a capital or oth- "erwise infamous punishment."

In the language of the court:

"The leading word 'capital,' describing the crime by "its punishment only, the associated words 'or otherwise "infamous crime' must, by an elementary rule of con- "struction, include crimes subject to any infamous pun- "ishment, even if they should be held to include also "crimes infamous in their nature, independently of the "punishment affixed to them." And the court further declared its judgment to be "that a crime punishable by as can only be prosecuted by indictment, and whether the several counts of the information set forth sufficient facts to constitute a violation of the sections named or any of them. As certified, the questions are:

"1. Whether the crimes or any of them charged against the defendants in the counts of the information, are infamous crimes within the meaning of the fifth article of amendment of the constitution of the United States?

2. Whether the defendants can or not be held to answer in the courts of the United States for the crimes charged, or any of them, against them herein, otherwise than on the presentment or indictment of a grand jury?

3. Are the papers, records, returns, poll books, ballots, tally lists, certificates, or other papers described in the sixth and seventh counts of the information, records, papers, proceedings or documents such as are embraced by or are described in section 5403 of the Revised Statutes of the United States; and is the county clerk's office of Cook county, Illinois, a public office within the meaning of that section and with reference to the laws of the United States and of the State of Illinois upon the subject of elections?

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In the language of the court:

"The leading word 'capital,' describing the crime by "its punishment only, the associated words 'or otherwise "infamous crime' must, by an elementary rule of con- "struction, include crimes subject to any infamous pun- "ishment, even if they should be held to include also "crimes infamous in their nature, independently of the "punishment affixed to them." And the court further declared its judgment to be "that a crime punishable by "imprisonment for a term of years at hard labor is an "infamous crime, within the meaning of the fifth amend- "ment of the constitution." In that case the prosecution was by information for a violation of sections 5,430 and 5,431 of the Revised Statutes. The punishment imposed for a violation of those sections is imprisonment in the penitentiary at hard labor for a period not exceeding fifteen years, and a fine not exceeding five thousand dollars. The punishment imposed was fifteen years' imprisonment at hard labor in the house of correction at Detroit, and a fine of five thousand dollars. From the facts as reported it seems quite doubtful whether the defendant was guilty of the crime charged, and whether he was guilty of any offense of a higher grade than an intent to obtain goods or money by false pretenses. It does appear that the case was a very hard one, and the sentence and punishment most severe. There are in the whole range of the statutes but few offenses that are visited with so severe a penalty. It was a case that appealed most strongly to the court for relief; and while in theory the court could only inquire into the naked question of the legality of the imprisonment, it is easy to believe that the hardship of the case may have influenced the decision rendered. That decision was rendered upon a particular state of facts and upon a particular statute, and the court is extremely cautious to confine the opinion in terms to that case as made, and to its facts as stated, and to declare that it is not the purpose of the court to determine anything, or to be understood as intimating an opinion beyond the strict requirements of the facts in that case. The cautious expressions, of the court in thus guarding the opinion from any construction that would extend its scope beyond the letter of the law and the facts of the case, are most unusual.

The opinion in the case of *Ex parte Wilson* is a reversal of all that has been said upon the subject of prosecutions by information, by the Circuit and District courts of the United States, in our whole history. In those courts it had been the practice to sustain prosecutions by information for any crime, a conviction of which would not at common law disqualify the party convicted from being a witness. Those courts had, with great unanimity of decision, construed the words of the constitutional amendment, "for a capital or otherwise infamous crime," to refer only to the character of the crime, and not to the mode of punishment. In this court, in the *case of Wilson*, p. 425, it was said: "Within the last fifteen years, prosecutions "by information have greatly increased, and the general "current of opinion in the Circuit and District courts has "been towards sustaining them for any crime, a conviction of which would not at common law have disqualified the convict to be a witness. *United States* v. *Shepard*, 1 Abbott, U. S., 431; *United States* v. *Maxwell*, "3 Dillon, 275; *United States* v. *Block*, 4 Sawyer, 211; "*United States* v. *Miller*, 3 Hughes, 553; *United States* "v. *Baugh*, 4 Hughes, 501; *United States* v. *Yates*, 6 "Fed. Rep., 861; *United States* v. *Field*, 21 Blatchford, "330; *In re Wilson*, 18 Fed. Rep., 33."

And again in the same case, the court referring to section 1022, Revised Statutes, said: "The provision of Rev. Stat., § 1022, derived from the Civil "Rights Act of May 30, 1870, chapter 114, section 8, "authorizing certain offences to be prosecuted either by "indictment or by information, does not preclude the "prosecution by information of other offenses of such a "grade as may be so prosecuted consistently with the "constitution and laws of the United States."

That section declares that "All crimes and offenses "committed against the provisions of chapter seven, title "'crimes' which are not infamous, may be prosecuted "either by indictment or by information filed by a district "attorney." In that section congress used the words: "all crimes and offenses" when speaking of the cases in which prosecutions by information will lie. "All crimes "and offenses * * * which are not infamous "* * * may be prosecuted by information." Here the infamy cannot by any possibility be made to turn upon the punishment. The word crimes taken by itself cannot be construed to refer to or include punishment. It is not associated with the word capital, and therefore suggestive of punishment, but its corresponding word is the word "offenses." Still further, the language is "all crimes and "offenses committed." It is then the "crime and offense "committed" that is to be prosecuted and that may or may not be infamous. It seems too plain to be questioned that in the opinion of congress, as expressed in that section, it was the crime and not the punishment that constituted the infamy that should bar a prosecution by information.

See also sections 1,044 and 1,046, Revised Statutes.

In speaking of the crimes that rendered the offender infamous, at page 422 of *Wilson's case*, this court, referring to a time anterior to the Declaration of Independence said:

"At that time, it was already established law, that the "infamy which disqualified a convict to be a witness de-"pended upon the character of his crime, and not upon "the nature of his punishment. *Pendock* v. *McKinder*, "Willes, 665; Gilb. Ev., 143; 2 Hawk. Ch., 46, § 102; "*The King* v. *Priddle*, 1 Leach (4 Ed.), 442. The dis-"qualification to testify appears to have been limited to "those adjudged guilty of treason, felony, forgery and "crimes injuriously affecting, by falsehood and fraud, the "administration of justice: such as perjury, subornation of "perjury, suppression of testimony by bribery, conspiring "to accuse one of crime or to procure the absence of a "witness; and not to have been extended to cases of "private cheats, such as the obtaining of goods by false "pretenses, or the uttering of counterfeit coin or forged "securities. 1 Greenl. Ev., § 373; *Utley* v. *Merrick*, 11 "Met., 302; *Fox* v. *Ohio*, 5 How., 410, 433, 434."

It seems quite clear from the whole opinion that the case turned upon the construction of the words "capital "or otherwise infamous crime," for it seems to have been conceded by the court that at common law it was the crime and not the punishment that constituted the infamy. If congress intended by the amendment of the constitution to make the punishment and not the crime infamous, they thereby changed the common law rule as it had existed for centuries, and in doing so used the words, "capital or "otherwise infamous crime," instead of "capital or other-"wise infamous punishment." And this the congress that adopted the amendment did without any suggestion that it was the purpose to change the common law rule and make the infamy turn upon the punishment, and not upon the crime. If, as this court has said, congress meant by the use of the word crime the same as punishment, and if congress so understood it, it is strange that it did not evoke some discussion, in view of the fact that it was a change of the rule that had existed for centuries.

Is not the fact that no amendments were proposed to that portion of the paragraph, and no discussion had thereon, very strong evidence that congress did not intend to use the word crime to express punishment and that it was not so understood?

At page 423 of the *Wilson case* the court, speaking further upon the subject of prosecutions by information said: "By the law of England, informations by the at-"torney general, without the intervention of a grand jury, "were not allowed for capital crimes, nor for any felony, "by which was understood any offense which at common "law occasioned a total forfeiture of the offender's lands, "or goods, or both, 4 Bl. Com., 94, 95, 310. The ques-"tion whether the prosecution must be by indictment, or "might be by information, thus depended upon the con-"sequences to the convict himself."

Those offenses above enumerated, treason, felony, forgery, perjury and the like, as constituting, at common law, the crimes known as infamous, embraced all the more grave offenses, either by statute or at common law. The term felony itself included all the higher offenses. It will be seen therefore that the term "infamous crime," as applied to the English law, would embrace all the higher offenses known to the law. Forfeiture of lands or goods as a consequence of crime is unknown to our laws in the sense in which it was known to the common law. When we use the term felony, we use it to define an offense which at common law worked a forfeiture of lands or goods or both; that is we define the crime by that term. Its punishment we fix by our own laws; but forfeiture of lands or goods is not one of the modes of punishment. As the results which followed a conviction of felony at common law do not follow here, when we use the word felony, we apply it to the crime as known at common law, but we have no way known to our law of extending the list of crimes that are felonies otherwise than by declaring them so by statute and in that case they become felonies by such declaration, but are not followed by forfeiture of lands or goods. When in our constitution or laws we speak of an "infamous crime," we mean such a crime as is referred to in the foregoing paragraph quoted from *ex parte Wilson*, and such other crimes as by statute may be declared felonies or otherwise infamous. When we speak of felonies, as known at common law, it is without reference to the forfeiture of lands or goods as the result of crime, and we have only in view the nature of the act or crime itself, as larceny, forgery, perjury, robbery and the like. Each of these is a felony, and each stands for a specific and well known crime; and when we speak of felony at common law we mean the crime, and not the result of the crime or its punishment.

Blackstone, Book 4, page 95, says: "all offenses now "capital are in some degree or other felony. * * * * "So that upon the whole, the only adequate definition of "felony seems to be that which is before laid down, viz: "an offense which occasions a total forfeiture of either lands "or goods or both, at the common law, and to which capital or other punishment may be superadded, according "to the degree of guilt." The forfeiture was to the king, and followed as a matter of course. The punishment was such as was imposed by the law and the judgment of the court. While the offense committed in either of two cases worked entire forfeiture of lands and goods, in the one the punishment might be capital, and in the other a fine, imprisonment, or a placing in the pillory or the stocks, whipping, cropping of the ears or branding.

In what sense is the constitutional provision contained in the fifth amendment to be understood? The words are: "No person shall be held to answer for a capital, "or otherwise infamous crime, unless on a presentment or "indictment of a grand jury, except in cases arising in the

" land or naval forces, or in the militia, when in actual ser-
" vice in time of war or public danger."

To properly understand the meaning of the language used in this amendment, it is important to examine into its history.

In *Wilson's case* the court, referring to the amendment, said: "It had its origin in one of the amendments in the
" nature of a bill of rights, recommended by the conven-
" tion by which the State of Massachusetts in 1788, ratified
" the original constitution."

The State of Massachusetts, at the time it ratified the constitution of the United States, accompanied such ratifiration with certain proposed amendments. The sixth in the series of such proposed amendments provided:
" That no person shall be tried for any crime by which
" he may incur an infamous punishment or loss of life, un-
" til he be first indicted by a grand jury, except in such
" cases as may arise in the government and regulation of
" the land and naval forces."

Elliott's Debates (Ed. 1876), Vol. 1, p. 323.

The State of New Hampshire, in the sixth proposition of amendment accompanying her ratification, used the same language.

Ibid., p. 326.

The State of New York accompanied her ratification by a declaration or bill of rights, in which it was declared: " That (except in the government of the land
" and naval forces, and of the militia when in actual serv-
" ice, and in cases of impeachment), a presentment or in-
" dictment by a grand jury ought to be observed as a
" necessary preliminary to the trial of all crimes cogniza-
" ble by the judiciary of the United States."

Ibid., p. 328.

In reporting to the House of Representatives his original propositions of amendment of the constititution, Mr. Madison, in the seventh proposition, declared that: "In "all crimes punishable with loss of life or member, pre-"sentment or indictment by a grand jury shall be an es-"sential preliminary."

Annals of Congress, Vol. 1, p. 452.

As thus presented, its meaning is not doubtful. It extends only to loss of life or member.

Blackstone, Book 4, page 377, speaking of the different kinds of punishment inflicted upon offenders, says: "Some, though rarely, occasion a mutilation or dismem-"bering by cutting off the hand or ears; others fix a last-"ing stigma on the offender by slitting the nostrils or "branding in the hand or cheek."

At the time of the adoption of the constitution, criminals in the states of this Union were subject to the most loathsome and revolting punishments. They were compelled to labor at the treadmill and the crank. T were branded, had their ears cropped, and were co in the most loathsome prisons.

McMaster, in his History of the People of the United States, Vol. 1, page 100, speaking of the time of the revolution and subsequently, says: "Offenses to which a "more merciful generation has attached no higher pen-"alty than imprisonment and fine, stood upon the statute "books as capital crimes. Modes of punishment long "since driven from the prisons with execrations as worthy "of an African kraal, were looked upon by society with "a profound indifference. The treadmill was always go-"ing. The pillory and the stocks were never empty. "The shears, the branding iron and the lash were never "idle for a day." If half that is said by this writer, of the prisons and the punishments imposed upon criminals of that day be true, it is difficult to conceive at what punishments our ancestors aimed when they provided in the eighth amendment of the constitution that cruel and unusual punishments should not be inflicted. That amendment is copied entire from the bill of rights of 1688. Certain it is, however, that Mr. Madison was in favor of prosecuting only by indictment all crimes punishable with loss of life or member.

The propositions of amendment of Mr. Madison, after being discussed by him and others in committee of the whole, were referred, with the proposed amendments and declarations or bills of rights of the various states, to a special committee consisting of one member from each state, of which Mr. Vining was chairman, Mr. Madison also being a member. The committee was instructed "to take the subject of amendments to the constitution of "the United States generally into consideration and to "report thereupon to the House." Annals of Congress, (Vol. 1, pp. 690, 691.) The seventh proposition of amendment as reported by the committee and adopted by the House provided that: "The trial of all crimes (ex-"cept in cases of impeachment, and in cases arising in "the land and naval forces, or in the militia when in "actual service in the time of war or public danger) shall "be by an impartial jury of free holders of the vicinage, "with the requisite of unanimity for conviction, the right "of challenge, and other accustomed requisites, and no "person shall be held to answer for a capital or otherwise "infamous crime, unless on a presentment or indictment "by a grand jury." After propositions to amend, which are not important to the present inquiry, the paragraph was adopted in the form in which it came from the committee.

Annals of Congress, Vol. 1, pp. 788, 789.

It seems not to have been debated in the House and as at that time the debates in the Senate were not reported, we only know that it went to the Senate in the above form and was there amended. It appears from the annals of congress that the Senate adopted various amendments of the propositions as passed by the House and reduced the fifth amendment to its present form and it was conconcurred in by the House.

As already shown, the States of Massachusetts and New Hampshire proposed to declare by amendment of the constitution "That no person shall be tried for any crime by "which he may incur an infamous punishment or loss of "life, until he be first indicted by a grand jury." No words can make the meaning more plain. "Infamous punishment or loss of life" are the words upon which the paragraph turns. If congress had intended to adopt the meaning as expressed by those words, the English language did not furnish them with words to express it more clearly. Had congress used those words, nothing would have been left open for construction or conjecture. Had congress used those words or others like them, this court would not have been called upon at the close of almost a century to declare the interpretation of the amendment, and to reverse a long line of decisions in the Circuit and District courts. But congress did not use those words, though clear and comprehensive. Neither did it use the words of Mr. Madison's original proposition, "punishable with loss of life or member." It rejected both and substituted the words "capital, or otherwise infamous crime."

It rejected too the proposition of the State of New York declaring that all offenses against the United States should be prosecuted by indictment. The original proposition of Mr. Madison reached only such punishments as affected life or member. Consequently it did not reach fines or imprisonments. To that proposition, statutes imposing imprisonment in the penitentiary at hard labor, banishment or fine, would not be obnoxious. Is it not clear, then, that Congress in adopting the amendment as it now stands, intended to do what the reading of the words import, and provide that crimes then known as infamous, and such as Congress should declare infamous, should be prosecuted by indictment? As already shown, such construction would include all of the graver crimes, and would fix a rule easily understood and easy of administration. If Congress intended the paragraph should turn upon the nature of the punishment rather than the crime, it was easy for it to say so.

In this court, in the *case of Wilson*, it was held for the first time by any respectable court, that the framers of the constitution intended the words used to refer to the punishment and not the crime. In view of these facts this court ought not to regard the *case of Wilson* as conclusive upon the question, but rather should be willing carefully to review the grounds upon which the opinion in that case rests, and if wrong to declare the true interpretation of the amendment unrestrained by anything said in the former case.

The eighth proposition in the declaration or bill of rights of Virginia, and which accompanied her ratification of the constitution, provided: "That in all criminal "and capital prosecutions, a man hath the right to de- "mand the cause and nature of his accusation, to be con-

"fronted with the accusers and witnesses, to call for evidence and be allowed counsel in his favor, and to a fair "and speedy trial by an impartial jury of his vicinage, "without whose unanimous consent he cannot be found "guilty (except in the government of the land and naval "forces), nor can he be compelled to give evidence against "himself."

Elliott's Debates (Ed. 1876), Vol. 3, p. 658.

The language used is: "That in all criminal and capital "prosecutions a man hath the right to demand the cause "and nature of his accusation." The convention of the State of Virginia, it seems, was not content with declaring "that in all criminal prosecutions a man hath the "right to demand the cause and nature of his accusation," although nothing can be clearer than that the term "all criminal prosecutions" would necessarily include all capital prosecutions. North Carolina, in her declaration or bill of rights accompanying her ratification, adopted the language of Virginia in the eighth proposition already quoted, except it said "That in all capital and criminal "prosecutions," instead of "in all criminal and capital "prosecutions," as in the case of Virginia.

Elliott's Debates, (Ed. 1876) Vol. 4, 234.

The State of Rhode Island, in ratifying the constitution, accompanied it with a declaration or bill of rights, the eighth paragraph of which was in the same language as that of North Carolina, above referred to.

Elliott's Debates, Vol. 1, 334.

The action of these three states was before the committee. Each of them in referring to prosecutions, in which they intended to embrace capital offenses, was not content to use the simple phrase, "in all criminal prosecutions," but used the utmost, and it would seem to us unnecessary precaution to make the sentence apply in terms to "all capital and criminal prosecutions" in the case of two of the states, and to "all criminal and capital "prosecutions" in the case of the other. For the same reason the word capital was used in the fifth amendment; and when the framers used the words "capital or other-"wise infamous crime," the word capital added nothing to the paragraph, and its meaning, as it now stands, is just the same that it would have been if the word capital had been dropped, and the paragraph had read "an in-"famous crime." Those words would have included a capital offense, just as in the other case, the words, "all criminal prosecutions," are as broad and comprehensive as the words "all capital and criminal prosecutions."

Again, the proposed amendment by Massachusetts provided that "No person shall be tried for any crime, by "which he may incur an infamous punishment or loss of "life, until he be first indicted by a grand jury." Here the words are "infamous punishment or loss of life." The words, "infamous punishment," would surely include a capital punishment, for nothing can be more certain than that a capital punishment for crime was an infamous punishment, if such a thing as an infamous punishment was known to the law.

That a capital crime was regarded as an infamous crime by the Congress that proposed the fifth amendment, it needs no argument to prove. That Congress in the amendment placed a capital crime at the head of all infamous crimes, when it made use of the words "capital or otherwise infamous crime," and this, whether Congress intended the word crime to apply to the offense or to the punishment.

In the fifth amendment the word capital is inserted for abundant caution, just as in the other cases it was used for the same reason. It was intended to secure to the defendant a prosecution by indictment for all infamous crimes, and it was not intended to leave it doubtful whether capital crimes were included. Capital crimes are the most important, and in view of what has already been said, might well be mentioned specifically. There can be no doubt that the words "all criminal prosecutions," include capital prosecutions, and yet three states thought it necessary to insert the word capital, and the fourth used the words "infamous punishment or loss of life" rather than the words "infamous punishment." With the action of those states before it, the committee and Congress adopted the same mode of expression, and instead of saying "for an infamous crime," they said "for a capital or otherwise infamous crime."

In *Wilson's case*, this court referred to the opinion of Mr. Dane, a member of the Continental Congress, from Massachusetts, wherein he says that under the amendment of the constitution "informations cannot be used "when either capital or infamous punishment is inflicted." For this opinion, most briefly expressed, he cites no authority.

Mr. Dane was an eminent lawyer, but he was not a member of Congress at the time when the amendment of the constitution was adopted, and, so far as is known to us, had no special opportunities that enabled him, above others, to know the intention of Congress in its adoption. That he was familiar with the bill of rights of the State of Massachusetts, and with the proposed amendment of the constitution accompanying her ratification already referred to, there can be no doubt; and it may be presumed, that in giving a construction to the fifth amendment, he was influenced by the action of his own state upon that subject. If the members of Congress, who adopted the amendment, held to the views expressed by Mr. Dane concerning the amendment, they have not left their opinions upon record for our enlightenment; and the opinion of Mr. Dane seems to be in conflict with the action of Congress, and opposed by the history of the question, so far as known to us.

In the case of *Jones* v. *Robbins*, 8 Gray, 329, referred to and quoted from by this court in the *case of Wilson*, in support of the doctrine that it is the character of the punishment to which we must look in determining whether the crime is infamous, the question turned upon the construction of the words, "capital or infamous punishment," as contained in the bill of rights of the State of Massachusetts. There the punishment and not the crime, by express words used, constituted the infamy; and all persons imprisoned in the penitentiary in that state were by law subjected to hard labor. The court held that hard labor in the penitentiary was an infamous punishment. In the fifth amendment of the constitution of the United States the language is, "a capital or otherwise infamous crime." The one in express terms makes the infamy turn upon the punishment, and the other in express terms makes the infamy turn upon the crime.

Massachusetts' proposed sixth amendment to the constitution of the United States provided: "That no person "shall be tried for any crime by which he may incur an "infamous punishment or loss of life until he be first in-"dicted by a grand jury."

In her bill of rights she said, "a capital or infamous infamy attaches to the punishment, then the only question to be determined is whether the statute imposes an infamous punishment, without regard to the nature of the crime, or the civil rights of the party, as affected by the conviction.

The constitutional amendment cannot refer to both the crime and the punishment, for the word crime can only refer to the act committed as a violation of law; and the word punishment, if substituted for the word crime, can only refer to the punishment imposed by the judgment of the court. In the one case the infamy is pronounced by the law as the result of the conviction. In the other, the infamy consists in the punishment imposed directly upon the offender by the judgment of the court.

The word crime cannot include punishment, and the word punishment cannot include crime.

That portion of the statute imposing imprisonment for a period not exceeding ten years being directly before the court, and no suggestion being made that the punishment was infamous, for the reason that it might be to the full limit of the statute, and might be by imprisonment in a penitentiary, it is to be presumed the court did not regard that fact an obstacle to the prosecution of the case by information.

If it is said that in *Wilson's case* the court was undivided in the opinion that the question was whether the punishment was infamous, it is replied that in *Waddell's case* it was the unanimous opinion of the court that it was the crime, that constituted the infamy.

In *Waddell's case* the statute, as the result of a conviction, deprived the party of the right to hold office, and in the opinion of the court the crime was thereby made infamous; just as at common law an offense was regarded as infamous which as a result of a conviction deprived the party of the right to be a witness.

The *case of Waddell* is in the line of all the common law authorities, and is in harmony with the numerous decisions of the Circuit and District courts of the United States upon the subject.

This court held upon the most solemn argument in a capital case, that a prosecution by information under the laws of California was "due process of law," and that such a prosecution was not in conflict with the provisions of the fourteenth amendment of the constitution of the United States, declaring that no state shall "deprive any "person of life, liberty or property without due process "of law."

Hurtado v. *California*, 110 U. S., 516.

This court said in *Wilson's case* that prosecutions by information in the courts of the United States have greatly increased within the past fifteen years. It may also be said that within a comparatively recent period a number of the states have abolished the grand jury system and substituted for indictment the prosecution by information of all criminal offenses. It cannot be said that the present generation is less humane or less tender of individual life and liberty than the generation that adopted the constitution of the United States; and at a time when under the state governments the prosecution by information seems to be rapidly supplanting the prosecution by indictment, it would seem that no just reason exists for holding that as fair a trial and as perfect security of rights can not be had in the courts of the United States in prosecutions by information as by indictment.

It would certainly be safe to say that if the fifth amendment had not been adopted, and Congress were now to propose an amendment upon the subject, it would exclude the prosecution by information only in capital cases. The reason for the change that has taken place in a number of the states by the substitution of informations for indictments in all criminal cases, is that experience has shown that no evils result from such a practice, and that the liberty of the citizen is as secure in one case as in the other. The constitution of Connecticut, adopted in 1818, requires an indictment or presentment of a grand jury only in cases when the punishment of the crime charged is death or imprisonment for life.

In *Hurtado's case* this court said, after reviewing the history of the law of informations: "It is, as we have "seen, an ancient proceeding at common law, which might "include every case of an offense of less grade than a "felony, except misprision of treason. * * * It is "merely a preliminary proceeding, and can result in no "final judgment, except as the consequence of a regular "judicial trial, conducted precisely as in cases of indict"ments."

Still further, to the same effect, the court said (p. 538): "In reference to this mode of proceeding at the common "law, and which, he says, 'is as ancient as the common law "itself,' Blackstone adds (4 Com., 305): 'And as to those "offenses in which informations were allowed as well as "indictments, so long as they were confined to this high "and respectable jurisdiction, and were carried on in a "legal and regular course in His Majesty's Court of "King's Bench, the subject had no reason to complain. "The same notice was given, the same process was "issued, the same pleas were allowed, the same trial by "jury was had, the same judgment was given by the "same judges, as if the prosecution had originally been "by indictment.'"

Referring with approbation to the opinion of Sir Bartholomew Shower upon the subject of prosecutions by information the court said (pp. 524, 525): "Sir Bartholomew Shower, who was prevented from arguing in support of the information, prints his intended argument in "his report of the case under the name of *The King* v. "*Berchet*, 1 Show, 106, in which with great thoroughness, he arrays all the learning of the time on the subject. "He undertakes to 'evince that this method of prosecution is noways contrariant to any fundamental rule of "law, but agreeable to it.' He answers the objection that "it is inconvenient and vexatious to the subject by saying "(p. 117): 'Here is no inconvenience to the people. "Here is a trial *per pais*, fair notice, liberty of pleading "*dilatories* as well as *bars*. Here is *subpoena* and *attachment*, as much time for defense, charge, etc., for "the prosecutor makes up the record, etc.; then, in "case of malicious prosecution, the person who prosecutes is known by the note to the coroner, according to "the practice of the court.'

"He answers the argument drawn from Magna Charta, "and says:

"'That this method of prosecution no way contradicts "that law, for we say this is *per legem terrae et per communem legem terrae*, for otherwise there never had been "so universal a practice of it in all ages.'

"And referring to Coke's comment, that 'no man shall "be taken,' *i. e.*, restrained of liberty by petition or suggestion to the King or his Council, unless it be by indictment or presentment, he says, (p. 122): 'By petition or "suggestion can never be meant of the King's Bench, "for he himself had preferred several here; that is meant "only of the King alone, or in council, or in the Star Chamber. In the King's Bench the information is not a suggestion to *the King* but to the *court* upon record.'

"And he quotes 3 Inst., 136, where Coke modifies the "statement by saying: 'The King cannot put any to "answer, but his court must be apprised of the crime "by indictment, presentment, or *other matter of record*,' "which Shower says, includes an information."

The reason of the adoption of the fifth amendment of the constitution of the United States, restraining the prosecution of certain offenses by information in the national courts, was to place a limitation upon the exercise of power by the general government. The great fear that pervaded the minds of many of the leading statesmen of that day, was that the general government would usurp power and infringe upon the rights of the citizen.

The fear they had justly entertained of kingly power, they, in large degree, transferred to the government of their own creation, and the fifth amendment, with others adopted at the same time, constituted a bill of rights.

Among those amendments the tenth declared that, "The powers not delegated to the United States, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

The fifth amendment further declared that no person should "be deprived of life, liberty or property, without "due process of law." That was imposed as a restraint upon the exercise of power upon the part of the United States. In 1866, after the close of the great civil war, congress proposed to the people for adoption the fourteenth amendment of the constitution, wherein it is declared that no state shall "deprive any person of life, "liberty or property, without due process of law," and the people ratified it and made it a part of the constitution, and a limitation upon the exercise of power by the several states.

This court said in *Hurtado's case* that a prosecution by information for a capital crime is "due process of law," and maintainable in the courts, and under the law of the state. The same reasoning that will maintain such a prosecution in a state court, would be equally potent and conclusive to sustain a like prosecution in the courts of the United States for all capital and other offenses, were it not for the first paragraph of the fifth amendment prohibiting such prosecutions for "a capital or otherwise infamous crime." In view of these facts, and in the light of history as applicable to the subject, this court ought not by construction to extend the scope and meaning of the constitutional amendment, for the purpose of embracing within it, and thereby excluding from prosecution by information, offenses not clearly prohibited.

2. The only offense charged in this case is a conspiracy, and such a conspiracy was never an infamous crime; neither is it a felony. It is simply under the Revised Statutes, a misdemeanor, and all the offenses that it is alleged in the information the conspiracy was entered into to commit, are misdemeanors and are not infamous.

Wharton's Crim. Law, Vol. 1, §§ 2 and 3.
Wharton's Crim. Pl. & Prac. § 89.
U. S. v. *Daubner*, 17 Fed. Rep., 794–5.
U. S. v. *Yates*, 6 Fed. Rep., 865.
U. S. v. *Baugh*, 1 Fed. Rep., 787–8.

U. S. v. *Mills*, 7 Pet., 140.
U. S. v. *Lancaster*, 2 Mc Lean, 431–33.

The conspiracy here charged is a statutory offense, and all the objects of the conspiracy, as charged, are to commit offenses in violation of the laws of Congress.

Crimes at common law are unknown to the courts of the United States so far as punishment is concerned, and in those courts a criminal prosecution cannot be instituted for any offense not made punishable by a law of Congress. A crime known by its common law name or designation, as burglary, larceny, and the like, may be so referred to and designated in a criminal statute enacted by Congress, and we must in such case look to the common law for its definition, but Congress must affix to it the punishment to be imposed. The courts of the United States have no common law jurisdiction in criminal cases. As said by this court: "The legislative authority of the "Union must first make an act a crime, affix a punishment "to it and declare the court that shall have jurisdiction of "the offense."

United States v. *Hudson*, 7 Cranch, 34.
United States v. *Coolidge*, 1 Wheaton, 415.
United States v. *Reese*, 92 U. S., 216.
United States v. *Britton*, 108 U. S., 206.

In the case of the *United States* v. *Mills*, 7 Pet., 138, the indictment was for a violation of the post-office laws, and was based upon the twenty-first and twenty-fourth sections of the act of March 3, 1825. As will appear from an examination of the opinion, the court intended to refer to the twenty-first section, and not the second, though the second section is the one mentioned. The language used is that of the twenty-first section, and nothing like it is found in the second section. The latter section refers only to the oath to be taken by persons in the postal service. The punishment imposed by the twenty-first section for the offense charged, was imprisonment for not less than ten years, nor exceeding twenty-one years.

In speaking of the nature of the offense charged in the indictment, the court said: "The offense charged in this "indictment is a misdemeanor, where all are principals; "and the doctrine applicable to principal and accessory in "cases of felony, does not apply."

In the case of *The United States* v. *Lancaster*, 2d McLean, 431, the defendant was indicted under section 21 of the same act, and upon a motion to quash the indictment, Mr. Justice McLean said: "The Federal government "has no jurisdiction of offenses at common law. * * * "It can exercise no criminal jurisdiction which is not "given by statute, nor punish any act criminally, except "as the statute provides. The offenses defined in the "post-office law are misdemeanors, and not felonies, and "by the Federal government they are only punishable "under the statute." The defendant was convicted and sentenced to ten years imprisonment in the penitentiary.

The violation of section 5,440 may consist in a conspiracy "either to commit an offense against the United "States, or to defraud the United States." The conspiracy may be charged to commit any one or more of the offenses defined as punishable by the laws of the United States, or it may be to defraud the United States out of an insignificant sum of money. In either case, it is the conspiracy that is punishable, and the character and grade of the offense is the same in either case. If an information will lie for a conspiracy, under section 5,440, to defraud the United States out of a small sum of money, then, for the same reason an information will lie for a conspiracy to commit any of the offenses defined in the sections of the Revised Statutes, upon which the various counts of the information in this case are based. It is the conspiracy to commit the offense, and not the offense which the conspiracy was entered into to commit, that is punishable by section 5,440.

3. It is contended by the plaintiffs in error that the information would not lie, because, by the state law, all persons convicted of a penitentiary offense are infamous, and deprived thereby of the right to hold office or vote at an election. The judgment of a court of the United States pronouncing such a sentence would not be within the purview of the state law; nor would the judgment of any court but a court of competent jurisdiction created by the laws of the state. The judgment of a court of the United States, or of another state, would not have that effect, and it was not intended by the state law that it should have that effect.

United States v. *Baraboo*, 14 Blatch., 74.
Sims v. *Sims*, 75 N. Y., 466.
National Trust Co. v. *Gleason*, 77 N. Y., 410.
Com. v. *Green*, 17 Mass., 515.
Jackson v. *Rose*, 2 Virg. Cases, 34.
Campbell v. *State*, 23 Ala., 44.
1 Greenleaf Evidence, § 376.

But there is another and more important reason why the state law can have no application here. The state cannot, by its legislation, in any way regulate or limit the jurisdiction of the courts of the United States. They are created by Congress under the authority of the constitution of the United States. Their jurisdiction is defined by Congress and cannot be affected by any other authority, state or national.

An act may be a crime against both the national and state jurisdictions, and the act may be punished by both, and the punishment by one cannot be pleaded in bar of a prosecution by the other.

Fox v. *State of Ohio*, 5 How., 410, 435.
United States v. *Reid*, 12 How., 366.
Moore v. *Illinois*, 14 How., 13, 20.
United States v. *Cruikshank*, 92 U. S., 542, 550.
Ex parte Siebold, 100 U. S., 371, 390.

If it were in the power of the state legislature to declare what should constitute an infamous crime, then the state might, by its legislation, oust the courts of the United States of the jurisdiction and power to proceed by information in any case. It is to the constitution and laws of the United States that we must look to ascertain the jurisdiction and power of the courts of the United States, and not elsewhere. It is not the punishment that renders a crime infamous, but it is the character and nature of the crime, without regard to the punishment provided as a penalty for its commission that is to determine the question whether it is or is not infamous. To hold that the laws of the different states could in any way control the question now under consideration, would require that the courts of the United States should, in the administration of criminal law, be governed by a different rule in each state, dependent upon the local law of the state where the court was held, and thus the courts of the United

States would depend for the exercise of their jurisdiction upon the varying laws of thirty-eight states, and not upon the laws of Congress.

If the state law applies to this case, and a man convicted of crime in the courts of the United States in Illinois and sentenced to the penitentiary, is thereby rendered infamous for the reason that the law of Illinois provides generally that a person convicted of any crime punishable by imprisonment in the penitentiary is thereby deprived of the right to vote, no reason is perceived why the same result would not follow if the court sat and the judgment was pronounced in Indiana instead of Illinois. The United States court is as foreign to the criminal laws of Illinois, when sitting in Illinois, as it would be if sitting in Indiana, and if the law of Illinois applies to a conviction in a court of the United States sitting in Illinois, it as certainly applies to a conviction in the courts of the State of Indiana or the courts of the United States sitting in that state. It either applies only to the courts of Illinois, or it applies to all courts. If the question of infamy depended upon the state law as applied to the punishment, then it would depend upon the law of the state wherein the court of the United States was held whether or not it could proceed by information in a given case. Thus in Indiana a conviction of a crime, punishable by imprisonment in the penitentiary, might, as a matter of law, work no forfeiture of any right other than the liberty of the defendant for the time being, while in Illinois it might work a forfeiture of the right to vote, to hold office, and to be a witness. In the one state the punishment might be regarded as infamous, while in the other it was not infamous, either in fact or in law.

4. Conceding for the sake of the argument that a statute of the United States, imposing hard labor in the penitentiary as a punishment for crime, cannot be proceeded under by information for the reason that such punishment is infamous under the constitution, it does not bar the prosecution in this case, because the statute under which this proceeding is had does not impose hard labor, and a sentence to hard labor under it would be unlawful, whether the prosecution were by indictment or by information.

From the passage of the first Crimes Act in 1790 to this day, Congress, in the enactment of criminal statutes, has made a broad and unmistakable distinction between offenses punishable by imprisonment, and offenses punishable by imprisonment at hard labor. Seventy-one sections of the Revised Statutes impose the punishment of imprisonment at hard labor, as a punishment for crime, and under section 5540, such imprisonment must be executed in a penitentiary. The same statutes contain fifty-one sections imposing imprisonment, without hard labor, for a period that may be longer than one year, and consequently such as may be executed in "a state jail or penitentiary," as provided in section 5541.

The crime of conspiracy may or may not be punished by imprisonment in the penitentiary. It may be punished only by a fine; it may be by imprisonment in the jail, or it may be both by fine and imprisonment.

If the term of imprisonment is longer than one year, it may be executed in the penitentiary, but in no event can hard labor be imposed.

Such was the view taken of the law by the District court in this case, and consequently the sentence was to imprisonment, but not including therein hard labor.

Neither by the law of their conviction nor the judgment of the court could the punishment of hard labor be imposed upon the defendants in this case, and if imposed at all, it could only be by virtue of section 5539 Revised Statutes, which provides that "when any criminal, con-"victed of any offense against the United States, is impris-"oned in the jail or penitentiary of any state or territory, "such criminal shall in all respects be subject to the same "discipline and treatment as convicts sentenced by the courts "of the state or territory in which such jail or peniten-"tiary is situated, and while so confined therein shall be ex-"clusively under the control of the officers having charge "of the same, under the laws of such state or territory." The language is, "such criminal shall in all respects be "subject to the same discipline and treatment as convicts "sentenced by the courts of the state."

The statute does not require that the persons sentenced simply to imprisonment, shall receive the same punishment, as those convicted and sentenced by the courts of the state. Congress has provided the two specific modes of punishment, the one imprisonment, and the other imprisonment at hard labor. It certainly cannot be successfully claimed that they mean one and the same thing. If they have the same meaning, and a sentence to the penitentiary is the same in all respects as a sentence to hard labor, then why make mention in any case of hard labor? But it is quite plain that Congress uses the words hard labor advisedly, and only uses them when prescribing the punishment to be applied to the highest grades of crime, and usually where the longest term of imprisonment is imposed. Such was the case of *ex parte Wilson, supra.* There the crime was of a high grade, and Congress made the punishment imprisonment fifteen years and at hard labor. The views here expressed are supported by section 5541. By the express terms of that section, "In "every case where any person convicted of any offense "against the United States is sentenced to imprisonment "for a period longer than one year, the court by which the "sentence is passed, may order the same to be executed in "any state jail or penitentiary within the district or state "where such court is held." The terms of that section embrace "every case" where the term of imprisonment is longer than one year. It matters not how low the grade, or how trivial the character of the crime, as compared with others, if it may be punished by any kind of imprisonment "for a period longer than one year," it may be executed in a penitentiary. In "every case" for every crime known to the laws of the United States, the offender found guilty may be sent to the penitentiary, provided, only, the sentence of imprisonment may be, and is, longer than one year. The sentence pronounced under that section, though it may impose imprisonment in the penitentiary, is a far different and milder punishment than that required and imposed in the case of *ex parte Wilson.*

It is provided in section 5540, Revised Statutes, that the court "shall have power to sentence any one convicted of "any offense punishable by imprisonment at hard labor, "to the penitentiary." No limit is prescribed to the term of imprisonment, and it makes no difference whether it be for a longer or shorter period than one year. If the defendant is guilty of an offense punishable by imprisonment at hard labor, it must be executed in the penitentiary. Congress made a distinction between imprisonment in the penitentiary and imprisonment in the penitentiary at hard labor, in the various statutes defining crimes and imposing punishments, and by these two sections it has preserved that distinction.

That punishment by imprisonment in the penitentiary is not the same, and was not intended by Congress to be the same, as imprisonment in the penitentiary at hard labor, is further shown and illustrated by section 5421 of the Revised Statutes. That section provides that every person who falsely makes, alters, forges or counterfeits any deed, power of attorney or other writing, with intent to defraud the United States, "shall be imprisoned at "hard labor for a period of not less than one year or "more than ten years; or shall be imprisoned not more "than five years and fined not more than one thousand "dollars." Here imprisonment at hard labor and simple imprisonment are both provided for in the same section, and in reference to the same offense. If the imprisonment is to be at hard labor, by the terms of the statute it cannot be less than one year or more than ten years. If the punishment be under the other clause of the paragraph, it may be by imprisonment for any period not more than five years, and if more than one year, may be in a penitentiary, as provided in section 5541, Revised Statutes.

By section 5422, Revised Statutes, it is provided that every person who knowingly, and with intent to defraud the United States, has in possession any deed, power of attorney, or other writing, for the purpose of enabling another to obtain from the United States any sum of money, "shall be fined and imprisoned at the discretion "of the court." That section prescribes no limit to the term of imprisonment, other than the discretion of the court. Under it the court, if the imprisonment was more than one year, could direct that it be by confinement in the penitentiary. The court could not, however, order such imprisonment to be at hard labor, for the statute does not authorize it.

Again sections 5406, 5407, 5518, 5519 and 5520 Revised Statutes each provide that persons guilty of the offenses therein defined, "shall be punished by a fine of "not less than five hundred dollars nor more than five "thousand dollars, or be imprisoned, *with or without hard "labor*, not less than six months nor more than six years, "or by both such fine and imprisonment."

Sections 5336, 5342 and 5343 also impose imprisonment, with or without hard labor, as a punishment for the offenses therein described.

Under those sections it is in the discretion of the court to sentence a defendant to confinement in the penitentiary, either with or without hard labor, and the character of the imprisonment must be fixed by the sentence. If the court sentences to imprisonment only, there can be no authority anywhere to impose upon a prisoner so sentenced the punishment of hard labor. Neither can imprisonment in any case be at hard labor, unless prescribed by the statute creating the offense and defining its punishment.

So in this case. The statute prescribes imprisonment for a term not exceeding two years, or a fine of not more than ten thousand dollars, or both. The court sentenced the defendants to imprisonment in the penitentiary for the period of two years, and to pay a fine of five thousand dollars each. The statute does not prescribe hard labor, and the judgment of the court does not order it. The sentence of imprisonment being for a period longer than one year, the court had the power to direct its execution in the penitentiary, and in so directing it did not exceed its power or jurisdiction.

The statutes of Illinois provide that when the offense is punishable by confinement in the penitentiary, the jury shall fix the term of imprisonment, and the court, in pronouncing sentence, shall designate what portion of time the offender shall be subjected to solitary imprisonment, and what portion to hard labor.

Section 444, chapter 38, criminal code, Revised Statutes of Illinois, 1874, is as follows. "In all cases where the "punishment shall be confinement in the penitentiary, if "the case is tried by a jury, the jury shall say in their "verdict for what time the offender shall be confined, and "the court, in pronouncing sentence, shall designate what "portion of time the offender shall be confined to solitary "imprisonment; and what portion to hard labor."

Now, suppose that under the statute the State court should sentence a prisoner to imprisonment in the penitentiary for one year, fifty-one weeks of which should be confinement to solitary imprisonment, and one week to hard labor. If a prisoner sentenced to one year's imprisonment in the penitentiary by a court of the United States, for conspiracy, "shall in all respects be subject to the "same discipline and treatment as convicts sentenced by "courts of the state," and discipline and treatment mean punishment, what discipline and treatment will be prescribed in such case? Solitary imprisonment could not be a part of such discipline and treatment, if by discipline and treatment, or either, punishment is meant. And this for the reason that the laws of the United States do not recognize solitary imprisonment as a proper punishment, and make no provision for such punishment.

The statutes of the United states recognize imprisonment and imprisonment at hard labor as punishments proper to be imposed upon those restrained of their liberty, and solitary confinement imposed as punishment upon a prisoner confined under sentence of a court of the United States would be without authority of law.

If in such case solitary imprisonment could not be imposed as punishment for the crime committed against the United States, neither could hard labor be imposed unless provided in the law under which the conviction was had, and the sentence of the court. In the absence of a statute of the United States, authorizing and directing the imposition of solitary imprisonment or hard labor, it would be as lawful for the state authorities to impose one as the other, for neither could be imposed as a punishment for the crime of which the party was convicted. It is no answer to say that the statutes of the United States prescribe hard labor in certain cases. It can only be enforced upon the offender in such cases as are provided by law, and if hard labor can be imposed upon a defendant convicted in a court of the United States and sentenced simply to imprisonment in a penitentiary, only upon the ground that it is a part of the discipline and treatment which the prisoners of the state there confined receive, then for the same reason solitary imprisonment could be imposed as a punishment upon the prisoners of the United States, because imposed by the law of the state upon such state prisoners. When a defendant in a court of the United States is sentenced to imprisonment in a penitentiary for conspiracy under section 5440, of the Revised Statutes, he is to be subject to the same discipline and treatment as the prisoners of the state confined in the same institution, so far as is consistent with the law and the judgment of the court under and by virtue of which he is committed; but hard, labor or solitary imprisonment as a punishment for such offense cannot be imposed. Suppose the law of the state prescribed that all prisoners of the state imprisoned in its penitentiary should, as a part of their punishment, be flogged once a week, and should receive thirty-nine lashes well laid on upon the bare back, and that every prisoner should be branded and have his ears cropped, would it be lawful to impose such punishment upon a prisoner of the United States sentenced to imprisonment in one of the penitentiaries of such state as a part of the "discipline and treatment" of such institution? Certainly not. A person so committed would be subject to reasonable discipline and treatment, but not to a punishment to which he was not sentenced, and which the law of the United States did not warrant.

That the words discipline and treatment, as contained in section 5539, do not mean that the prisoners imprisoned under sentence of the courts of the United States shall be subject to the same punishment as those sentenced by the State courts, is apparent. If such were the meaning of the words, then the laws of the state, and not the laws of the United States, would control and govern, and the punishment inflicted would be that imposed by the state, and not by the laws of the United States. If the words discipline and treatment give authority to the state authorities to impose the same punishments upon United States prisoners as are imposed upon state prisoners, then they may impose any of the punishments provided for state prisoners upon the prisoners of the United States, without regard to the law or the sentence under which they were committed.

The words discipline and treatment do not refer to punishment, except as a part of the discipline, and for a violation of the rules and regulations of the prison. Discipline and treatment, as mentioned in section 5539, refer to control, management and government. As to these, the United States and the state prisoners are upon the same footing, but in no sense can the words discipline and treatment authorize a different punishment from that attached to the crime of which the offender is convicted. It will be further noticed in this connection, that section 5541 of the Revised Statutes provides that where a prisoner is convicted of any offense against the United States, and is sentenced to imprisonment for a period longer than one year, the court "may order the same to be executed "in any state jail or penitentiary within the district or state "where such court is held." The statute makes no distinction between "state jail and penitentiary," showing that they are both put upon the same footing, and in either case are simply to be places of confinement, unless by the terms of the statute under which the conviction is had, hard labor is imposed. So, too, with section 5539. A criminal convicted in the courts of the United States and "imprisoned in the jail or penitentiary of any state or territory, shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts "of the state or territory." The discipline and treatment of the prisoners of the United States in the penitentiary, are to be the same as that of the prisoners of the state confined therein; and the prisoners of the United States confined in the jail of the state, are to be subject to the same discipline and treatment as the prisoners of the state confined in such jail. Suppose that in the jails of the state all persons convicted of any crime in the state courts were sentenced to and required to perform hard labor, then and in that case, if section 5539, by requiring the prisoners of the United States to be subjected to the same discipline and treatment as the prisoners of the state, thereby requires the same punishment to be imposed, a prisoner of the United States, convicted of any crime, and sentenced to such jail for any period of time, would be required to perform hard labor. Such could not have been the intention of Congress. It must have intended that all persons convicted of any crime in the courts of the United States and sentenced to hard labor in the penitentiary should be so punished, though the prisoners of the state were by the laws of the state subject to other punishishments. It must have intended that prisoners sentenced to jail or to the penitentiary where the laws of Congress do not prescribe hard labor, should simply be confined therein.

The Prison Reform Congress, held in London, in 1872, was convened mainly through the efforts of this government, and the more certainly to secure its meeting, E. C. Wines, D. D., was appointed in 1871, by President Grant, in pursuance of a law of Congress, to aid the movement. At the congress held in London all the states of Europe were represented but one, and many delegates were present accredited from the different states of our own country. As the result of its deliberations the congress declared unanimously that " In the treatment of criminals, " all disciplinary punishments that inflict unnecessary pain " or humiliation should be abolished; and the penalties for " prison offenses should, so far as possible, be the diminu- " tion of ordinary comforts, the forfeiture of some privi- " lege, or of a part of the progress made toward liberation. " Moral forces and motives should in fact be relied on so " far as is consistent with the due maintenance of discipline; " and physical force should be employed only in the last " extremity."

Wines, State of Prisons (1880) p. 55.

Plainly in the use of the words treatment and discipline as they occur in the above paragraph, they refer to the control and government of the prisoner, and not to the punishment inflicted in pursuance of the sentence under which he was imprisoned.

In 1878 a similar congress was convened at Stockholm. Of it Dr. Wines says "It was literally, as it proposed to "be, a congress of the whole civilized world."

Wines, State of Prisons (1880) p. 57.

The final action of the congress assumed the form of question and response. The questions and responses were sixteen in number and among them is the following:

"Q. What disciplinary punishments may be fitly em-"ployed in prison?

"R. The congress declares its approval of the follow-"ing disciplinary punishments in penitentiaries:

"1. Admonition.

"2. The partial or absolute privation of the rewards "accorded.

"3. A more strict imprisonment.

"This last punishment may be increased in severity, so "far as the health and character of the prisoner will per-"mit, by withdrawing from his cell the table, chair or bed; "by darkening the cell; or by depriving him of the per-"mission to read and work.

"If the above mentioned punishment do not suffice, the "following may be applied under the reserve specified in "foregoing paragraph:

"4. A reduction of the rations of each day, conjointly "with the privation of work.

"5. In cases of great violence and of fury on the part of "the convict, the strait-jacket or some similar agency "may be used."

Wines, State of Prisons, p. 62.

Such, in the opinion of the three hundred delegates gathered in that congress, is the meaning of the word discipline as applied to a prisoner confined in a penitentiary.

Of the congress, Dr. Wines further says: "Among "other delegates were a number of justices and even "chief-justices of Supreme courts and other high courts "of criminal jurisdiction in the several European countries "and British colonies; many English and continental "magistrates; not a few distinguished professors in the "criminal law departments of universities; several members of parliaments, English and continental; numerous "heads and other officers of prisons and reformatories; many "representatives of prison societies; and a large number "of eminent specialists from all the different countries, "who came in response to personal invitations issued by "the international commission." *Ibid.*, p. 57. A fair illustration of the distinction between punishment and discipline as applied to this subject is seen in a paragraph from Wines, State of Prisons, p. 23:

"Cropping, branding, whipping and torture in punishment of crime have been abolished, with an unfortunate "exception in one small state. The lash as a disciplinary "punishment is very generally forbidden by law, except "in the southern states, as are also cruel, unusual or degrading inflictions."

And again on page 99: "Wherever it (the lash) has "been discontinued, the unanimous testimony is that its "disuse is an equal gain to the discipline and the moral "force of a prison."

On p. 671, he says, under the heading "Disciplinary "Punishment": "What disciplinary punishment may be "fitly employed in prisons? The detention prison, so "long as it does not overstep its just limits, is a right of "society, and the duty of a person arrested on a charge

“ or suspicion of crime is to submit to its discipline, even supposing him to be innocent. * * * * * * *

“ The rule which we would follow in establishing disciplinary punishments would be not to injure the health of either the body or the soul, and in the sad case of not being able to maintain this harmony, to prefer the welfare of the soul to that of the body. We believe that in a prison where rewards are carefully studied and equitably distributed it will rarely be necessary to resort to punishments at all, but in case of necessity these should be employed without hesitation. Such punishments should be the diminution of privileges, or in a grave case, the withdrawal of all.”

In his opinion, an innocent man under arrest for crime, is to submit to the discipline of the prison where he is confined, with the same obedience as the guilty man.

In that case the discipline is not a punishment for crime, for the prisoner, when committed, was, in law, presumed to be innocent, and in the case supposed was in fact innocent.

A reference to the statutes of some of the states will show the manner in which the terms discipline and treatment are used, and that they contemplate that the prisoners of the United States may be imprisoned in the penitentiary either with or without hard labor.

It will be apparent, from an examination of the statutes of Ohio, that the legislature of that state understood the laws of Congress to provide for the imprisonment in the penitentiary, either with or without hard labor, of offenders against the laws of the United States. Her statute provides that “ All criminals sentenced to the penitentiary by the authority of the United States shall be received and kept according to the sentence of the court by

" which they were tried, and the prisoners so confined " shall be subject in all respects to the same discipline and " treatment as though committed under the laws of this " state."

Rev. Stats. Ohio, 1880, Vol. 2, § 7,433.

By that section the prisoner is to be " kept according " to the sentence of the court."

That the discipline and treatment spoken of in the Ohio statute, and which are to be the same as imposed upon the prisoners of the state, do not mean punishment, most clearly appears from an examination of section 7427 of the same statute. Under the head of " Treatment of Prisoners," it is provided that every convict received shall be washed and cleaned, and his clothes, if of sufficient value, preserved.

2. He shall be provided with a suitable bed and sufficient covering, and with sufficient plain and wholesome food.

3. Sentence to solitary confinement may be modified so far as necessary to prevent serious injury to health.

4. No punishment shall be inflicted except by the order and under the direction of the warden.

6. Rules and regulations, prescribing duties and obligations of prisoners, shall be printed and hung up in each cell and shop.

7. Each convict, when he leaves the penitentiary shall receive a suit of citizens' clothes, and the money he brought, and what may have been awarded him by the board for good behavior and diligent labor.

The statute of California, providing for the receipt and confinement of prisoners of the United States sentenced to imprisonment in the state prison of that state, is still more clear and specific. It provides that, " The authori-

" ties of the state prison must receive into the prison any " person convicted of an offense against the United States, " and keep such person in solitary confinement, or at hard " labor, or in confinement, with or without hard labor, as " provided in the order of the court pronouncing sentence."

Codes and Statutes of California (1876),
Vol 2, Sec. 1581.

In her prison act, under the heading, " Treatment of Prisoners," substantially the same provisions are found as in the case of Ohio under the same heading.

The State of Iowa has provided by statute that " All " punishment in the penitentiary by imprisonment must be " by confinement to hard labor and not by solitary imprisonment; but solitary imprisonment may be used as a " prison discipline for the government and good order of " the convicts."

McClain's Statutes of Iowa (1882), § 4770.

Here hard labor only is to be imposed as a punishment for crime, and solitary imprisonment is to be imposed only for discipline. The distinction between the words punishment and discipline is very clearly marked.

The Nebraska penitentiary act provides that " The " warden shall receive, safely keep and subject to the discipline of the penitentiary any criminal convicted of any " crime against the United States, and sentenced to confinement therein by any court of the United States sitting within this state."

Compiled Statutes of Nebraska (1883),
page 509, Sec. 23.

The meaning of the word discipline as there used is explained by section 20, which is as follows:

" *Discipline.* When any convict offers violence to any "officer or guard of the penitentiary, or to any person or "convict, or attempts to do any injury to the buildings or "any work shop, or any appurtenances thereof, or disobeys or resists any reasonable command of any officer "or guard, such officers and guards shall use all reasonable means to defend themselves and to enforce the observance of discipline."

The statute of Virginia providing for the confinement in the penitentiary of persons convicted in the courts of the United States, is as follows:

"Persons sentenced to imprisonment by the courts of "the United States held in Virginia, for a term of three "years or more, may also be confined therein with the approbation of the superintendent and governor (which approbation shall be recorded in the entry made upon such "convict's admission), and be safely kept and employed pursuant to the rules of the prison, *so far as is not inconsistent "with such sentence.*"

Code of Virginia (1872); p. 1261, sec. 2.

The statute of Tennessee contains the following: "Convicts sentenced to the penitentiary for life or any term of "time, by any court of this state or of the United States, "held within this state, shall be received into the penitentiary by the keeper thereof when delivered upon proper "authority, and there kept in pursuance of the sentence."

Compilation of Statutes, Tennessee (1871).
Vol. 3, Sec. 5494.

The statute of Illinois is not less clear upon the subject, and is the more important as being the statute of the state, from which this suit is brought. It is by that statute made the duty of the penitentiary commissioners to "make and require to be enforced all such general rules, "regulations and orders for the government and discipline "of said penitentiary, as they may deem expedient, and "may from time to time alter and amend the same."

Rev. Stats., Illinois (1874), Chap. 108, § 10.

And again in section 2 of the same act, in defining the duties of the governor as a visitor of the penitentiary, it is provided: "He shall inquire into all alleged abuses "or neglect of duty, and may make, in connection with "the commissioners, such alterations in the general discipline of the prison as he may deem necessary."

This is the discipline and treatment to which the prisoners of the United States, sentenced to the penitentiary at Joliet, are to be subject. It is such government and discipline as the commissioners may deem expedient, and may from time to time be altered and amended.

It will not be contended by any one that the discipline there referred to means punishment for the crime of which a prisoner was convicted.

The legislation of the several states referred to shows that the distinction between discipline and punishment is so clear as not to be mistaken, and that in the state penitentiaries the persons convicted in the courts of the United States are to be punished in accordance with the sentence of the court committing them and not in any supposed conformity to the punishments imposed upon the prisoners of the state.

Webster defines "discipline" as follows:

"1. The treatment suited to a disciple or learner; education; development of the faculties by instruction "and exercise; training.

"2. Training to act in accordance with established "rules; accustoming to systematic and regular action; "drill.

"3. Subjection to rule; submissiveness to order or "control; state of discipline."

The word "treatment," so far as it can have any application here, he defines thus:

"2. Manner of using; behavior toward a person, "whether good or bad; usage."

Worcester defines "discipline" as follows:

"1. Education; instruction; training.

"2. Anything as taught; art; science.

"3. Method of government; order; rule."

Treatment he defines as:

"1. The act or manner of treating; management; "usage.

"2. Entertainment; treat."

These definitions are clear and intelligible, and applied to the words discipline and treatment, as used in section 5,539 of the Revised Statutes, leave no doubt that they do not mean, and were not intended to mean, that the prisoners sentenced to the state penitentiary by the courts of the United States were, by virtue of this section, to be subjected to the same punishments imposed upon state prisoners as a punishment for the crimes for which they were imprisoned.

If the words discipline and treatment mean punishment, and the prisoners of the United States are to be subject, when confined in the penitentiary of the state, to the punishment imposed by the laws of the state upon the prisoners of the state, then we would have the anomaly of a system of criminal jurisprudence operating throughout the union, with the same law defining crime and fixing the punishment, and at the same time, punishment in fact, inflicted according to the criminal codes of thirty-eight different states. If such is the law, then the convict under the laws of the United States is to suffer the punishment imposed by the state where he happens to be imprisoned, and not that imposed by the law under which he was convicted, and the sentence of the court.

Take for illustration the case of *ex parte Wilson.* He was convicted in Arkansas and was sent to Michigan for imprisonment. Is a prisoner in such a case to suffer the punishment imposed by the law of the United States and the judgment of the court, or that imposed by the State of Arkansas, or the State of Michigan? Under the laws of the United States a defendant tried and convicted in a court of the United States in one state may be sent to a prison in another state designated by the attorney general in cases where the prisons of the state in which the party is convicted are unsafe or insufficient. A defendant charged with crime, therefore, may be convicted in one state, and sent under the direction of the attorney general to any other state for imprisonment.

When it is said that prisoners of the United States shall receive the same discipline and treatment as the prisoners of the state, it is simply meant that they shall receive the same care, submit to the same government, and be allowed the same privileges as the prisoners of the state. They shall be as well fed, as well warmed, as comfortably lodged and clothed, receive the same medical attendance, have the services of the chaplain, the benefits of the library, and the like, and shall submit to the same rules and regulations as the prisoners of the state. The presumption is that Congress, in the use of those words, intended them to be understood and applied in their ordinary sense. If they have any other meaning, Congress has failed to declare it. To apply to them any other meaning than that here contended for, is to place upon them a strained construction and one wholly unwarranted. It is to extend the scope and meaning of a criminal statute beyond what is fairly warranted by the language used.

5. This court in *Wilson's case* seems to have been of the opinion that it had never been the intention of Congress to declare by law that offenses punishable by imprisonment in the penitentiary might be prosecuted by information, and that in the various acts wherein prosecutions by indictment and by information are mentioned in connection with crimes and fines and forfeitures, it was the intention of Congress to provide only for the prosecution of lesser offenses, and for fines and forfeitures by information; and that the more grave offenses should be proceeded in by indictment. Referring to the first act of Congress upon the subject, the court said: "The only mention of in-"formations in the first Crimes Act of the United States "is in the clause providing that no person 'shall be "prosecuted, tried or punished for an offense not capital, "nor for any fine or forfeiture under any penal statute, "unless the indictment or information for the same shall "be found or instituted within two years from the time "of committing the offense, or incurring the fine or for-"feiture.' Act of April 30, 1790, Ch. 9, § 32; 1 Stat., "119." (p. 424.) It will be observed that the above act, passed within a year after the adoption by Congress of the fifth amendment, authorized in express terms the proceeding by information in criminal cases in the courts of the United States. At the time of the passage of that act the fifth amendment, though passed by Congress, had not been adopted by the states, and had not then become a part of the constitution. Consequently Congress in passing the act of April 30, 1790, was in no way restrained by the fifth amendment. Both measures were passed, however, by the same Congress. The constitutional amendment, at the time of the passage of the act, being inoperative, what reason can there be for saying that Congress

intended to apply the term information to fines and forfeitures and the lesser grades of crime, and to apply the word indictment to the higher grades? At the time when the act was passed nothing restrained Congress from providing by law that all crimes, high and low, murder and treason included, might be prosecuted by information. In view of that fact it seems apparent that the act gave equal power to proceed by information or indictment in all cases whatsoever It is true that when afterwards the fifth amendment of the constitution was ratified by the requisite number of states and became a part of the constitution, it operated to restrain the prosecution by information of all offenses embraced within its terms.

Section 1022, Revised Statutes, provides that "All crimes "and offenses committed against the provisions of chap-"ter seven, Title 'Crimes,' which are not infamous, may be "prosecuted either by indictment or by information filed "by a district attorney." Many of the offenses referred to are punishable by imprisonment in the penitentiary, and, as provided in the section, "may be prosecuted "either by indictment or by information." Sections 5511 and 5512 of chapter seven, referred to, are the sections upon which five of the counts of the information in this case are based, and provide for imprisonment not more than three years, and consequently such an imprisonment as may be executed in a penitentiary. If an information will lie for the offenses defined in sections 5511 and 5512, there can be no reason found why it will not lie for a conspiracy to commit the offenses defined in those sections, and that is the case here. Under section 5440, the imprisonment may extend to the period of two years, while under the other sections it may extend to three years.

The clearest expression ever given by Congress in any act passed by it upon the right and power to prosecute by information offenses punishable by confinement in the penitentiary, is found in the first section of the Act of July 5, 1884, Statutes at Large, 1883-84, page 122. That section provides: "That no person shall be prosecuted, tried or "punished for any of the various offenses arising under "the internal revenue laws of the United States, unless "the indictment is found or the information instituted "within three years next after the commission of the offense, in all cases where the penalty prescribed may be "imprisonment in the penitentiary, and within two years "in all other cases."

By that section prosecutions by indictment and information for offenses punishable by imprisonment in the penitentiary are placed upon the same footing. There can be no doubt about the meaning of Congress in passing it. It was not intended in the first part of the section to refer to any offenses whatever other than those punishable by imprisonment in the penitentiary, for only offenses so punishable are mentioned. It is true the section only refers to offenses arising under the internal revenue laws, but if an offense punishable by confinement in the penitentiary under those laws may be prosecuted by information, the same power exists in all other cases where the same punishment is imposed. In view of this legislation by Congress the paragraph quoted by the court in *Wilson's case*, from Mr. Justice Story, wherein he said, referring to prosecutions by information: "This process is rarely "recurred to in America; and it has never yet been formally put into operation by any positive authority of "Congress, under the national government, in mere cases "of misdemeanor; though common enough in civil prosetions for penalties and forfeiture," can hardly apply to the present condition.

In *Wilson's case* this court declared that the infamy was to be determined by the punishment imposed, and that "what punishments shall be considered as infamous may "be affected by the changes of public opinion from one "age to another."

If the question of infamy or no infamy is one of public opinion as applied to the punishment imposed, and the courts of the United States are to be governed by that opinion, it is apparent that in a great country like this, what may be regarded as an infamous punishment in one state, in another state may not be so regarded; and consequently following such a rule, the courts of the United States would have jurisdiction in one state to proceed by information, while in another state, by the same rule and in a like case, they would be deprived of jurisdiction.

Tested by that rule, how can it be contended that simple imprisonment in the penitentiary is an infamous punishment, and one that will bar a prosecution by information in the courts of the United States? By that rule it is a question of fact whether it is or is not infamous, and being a matter of fact and of public opinion, it changes from one age to another. Upon that question of fact no tribunal can possibly be better informed than the two Houses of Congress. The members are chosen from every state and district of the Union, and ought to be and are most capable of judging of the state of public opinion upon important public questions. Congress declared by law within a year before this prosecution was commenced that a prosecution by information for an offense punishable by imprisonment in the penitentiary was authorized by law.

In face of this legislation and this exposition of public opinion, will the court say that it is better informed upon the subject than Congress, and that, in so far as the act of

Congress authorizes the prosecution by information of offenses punishable by imprisonment in the penitentiary, such act is unconstitutional? To so hold would be to declare not only that the court knew better than Congress in regard to the fact, but it would be to declare the act of Congress unconstitutional on a question of fact, which would indeed be an anomaly.

Where will this court find a more reliable declaration of public opinion than in the solemn act of Congress upon the subject? This act is of so recent a date that it cannot be claimed that public opinion, or at least the opinion of Congress is not what it was when the act was passed.

In *Hurtado's* case the court, after referring to the restraints placed by the English people upon the exercise of kingly power, said (page 532):

"Restraints that could be fastened upon executive "authority with precision and detail, might prove obstruc- "tive and injurious when imposed on the just and necessary "discretion of legislative power; and, while in every in- "stance, laws that violated express and specific injunctions "and prohibitions, might without embarrassment, be "judicially declared to be void, yet, any general principle "or maxim, founded on the essential nature of law, as a "just and reasonable expression of the public will and of "government, as instituted by popular consent and for the "general good, can only be applied to cases coming "clearly within the scope of its spirit and purpose, and "not to legislative provisions merely establishing forms "and modes of attainment."

The principles there laid down apply with peculiar force to the case now before the court. The court has said that what is an infamous punishment is a question depending upon public opinion at the time. Congress has declared that an offense punishable by imprisonment in the penitentiary may be prosecuted by information, and has thereby declared that such a punishment is not infamous within the meaning of the fifth amendment of the constitution. Such a prosecution does not "come clearly "within the scope of the spirit and purpose" of the amendment, and so clearly as to require the court to hold that such a prosecution and the act of Congress authorizing it are alike in violation of the constitution.

Had the court held in *Wilson's case* that it was a question whether the crime was infamous, instead of holding, as it did, that it was a question whether the punishment was infamous, the question to be determined would have been one purely of law. In holding that the question was whether the punishment was infamous, it made the question one of fact, for it said the question was one of public opinion. When it made the question one of fact and depending upon public opinion, it was competent for Congress to determine the question of fact, and legislate accordingly.

The constitution provides that "No tax or duty shall be "laid on articles imported from any state."

"No bill of attainder or *ex post facto* law shall be "passed."

"No money shall be drawn from the treasury, but in "consequence of appropriations made by law."

These are prohibitions clearly understood, and no difficulty arises in a given case in applying the constitutional test; and it is to such prohibitions the court refers in the passage quoted from *Hurtado's case*, as "specific injunctions "and prohibitions." Here the case is very different. The question of infamy, as applied to the punishment, changes from age to age. It is, as the court has said, a question of fact, to be determined by public opinion as it may exist at any given time. Congress may determine what that opinion is, and by so doing will not render its acts liable to be declared void because in violation of the constitution.

In the *Legal Tender cases*, 12 Wall., 531, the court in passing upon the validity of a law of Congress, said: "A "decent respect for a co-ordinate branch of the govern- "ment demands that the judiciary should presume, until "the contrary is clearly shown, that there has been no "transgression of power by Congress—all the members "of which act under the obligation of an oath of fidelity "to the Constitution. Such has always been the rule. In "*Commonwealth* v. *Smith*, 4 Binney, 123, the language "of the court was, 'It must be remembered that, for "weighty reasons. it has been assumed as a principle, in "construing constitutions, by the Supreme court of the "United States, by this court, and by every other court of "reputation in the United States, that an act of the legisla- "ture is not to be declared void unless the violation of the "Constitution is so manifest as to leave no room for rea- "sonable doubt;' and in *Fletcher* v. *Peck*, 6 Cranch, 87, "Chief Justice MARSHALL said, 'It is not on slight impli- "cation and vague conjecture that the legsliature is to be "pronounced to have transcended its powers and its acts to "be considered void. The opposition between the Con- "stitution and the law should be such that the judge "feels a clear and strong conviction of their incom- "patibility with each other.' It is incumbent, therefore, "upon those who affirm the unconstitutionality of an act "of Congress to show clearly that it is in violation of the "provisions of the constitution. It is not sufficient for "them that they succeed in raising a doubt."

In *County of Livingston* v. *Darlington*, 101 U. S., 410, the language of Chief Justice MARSHALL in *Fletcher* v. *Peck*, *supra*, was cited with approval.

In the *case of Wilson* this court said that since the punishment of whipping and standing in the pillory were abolished "imprisonment at hard labor has been established for nearly all other ignominious punishments not "capital." The only punishments now known to the laws of Congress are fine, imprisonment, imprisonment at hard labor and death. If imprisonment at hard labor has taken the place of nearly all infamous punishments not capital, can it not be as truthfully said that it has taken the place of all infamous punishments not capital?

If such were the declared law of this court it would furnish a rule easily understood and easily administered. As already shown, it was the intention of Congress to make a distinction between imprisonment and imprisonment at hard labor.

If this court should be of that opinion, but should also hold that all persons sentenced to the penitentiary for more than one year would be subject to hard labor if hard labor was imposed upon the prisoners of the state confined therein, then the Circuit court under the act of March 3, 1879, has power to modify the judgment of the District court to inprisonment in the county jail.

THE COUNTS OF THE INFORMATION AND WHAT THEY CHARGE.

1. The first three counts of the information charge a conspiracy to violate section 5512, Revised Statutes.

That section applies to congressional elections, and provides that if any officer of registration, "or other person "who has any duty to perform in relation to such reg-

" istration or election, in ascertaining, announcing, or de-
" claring the result thereof, or in giving or making any
" certificate, document or evidence in relation thereto, know-
" ingly neglects or refuses to perform any duty required by
" law, or violates any duty imposed by law, or does any
" act unauthorized by law relating to or affecting such reg-
" istration or election or the result thereof, or any certifi-
" cate, document, or evidence in relation thereto, or if any
" person aids, counsels, procures or advises any such voter,
" person or officer to do any act hereby made a crime, or
" to omit any act the omission of which is hereby made a
" crime, every such person shall be punishable as prescribed
" in the preceding section."

The only officer specifically mentioned in the section is an officer of registration. All state officers and persons required by state laws to perform any duty are intended to be embraced in the words, " or other person who has " any duty to perform." It is alleged in those three counts that two of the defendants were deputy county clerks, and that it was their duty to safely keep the returns, ballots, tally lists and poll books of the election; and that they entered into a conspiracy with the other defendants to break open and destroy all of said documents and ballots; and various overt acts are charged to have been committed by the several defendants in pursuance of such conspiracy.

The deputy clerks had a further duty to perform in relation to such election, in ascertaining, announcing and declaring the result thereof and in giving and making a certificate in relation thereto within the letter and meaning of section 5512, and such duty was imposed by the terms of the election law of the State of Illinois. All the returns, poll-books and certificates thereon, tally-lists and ballots, were certificates, documents or evidence in relation to the congressional election in the fourth congressional district of Illinois. The law required their return to the county clerk's office, and required the county clerk and his deputies to safely keep them. Section 9 of chapter 35, Revised Statutes Illinois (1874), entitled "County Clerks," provides that "The county clerk shall have the "care and custody of all the records, books and papers "appertaining to and filed or deposited in their respective "offices." Section 6 provides that "He may appoint dep-"uties who shall take and subscribe the same oath for the "discharge of their duties as is required of him, which "shall be entered for record in his office."

Section 1, paragraph 8, chapter 131, Revised Statutes Illinois (1874), provides that: "The terms, 'sheriff,' "'coroner,' 'constable,' 'clerk,' or other words used for "an executive or ministerial officer, may include any "deputy, or other person performing the duties of such "officer, either generally or in special cases."

Every duty by law cast upon the county clerk is a duty to be performed by his deputies, and every power possessed by the county clerk in the general administration of the duties of the office is possessed in an equal degree by such deputies.

The sections of the election laws of the State of Illinois most important for an understanding of the questions involved in this case are the following, and are contained in chapter 46, Revised Statutes Illinois (1874).

"SEC. 34. Immediately on the appointment of such "judges [*i. e.* judges of election] the county clerk shall "make out and deliver to the sheriff of the county a notice "thereof, directed to each person so appointed, and the "sheriff shall, within twenty days after the receipt of

" such notices, deliver the same to the several judges so " appointed."

" SEC. 42. The county clerk shall provide, at the expense " of the county, proper blanks, poll-books and other " necessary election blanks for each precinct and district " in his county, and cause a suitable number thereof to be " delivered to the judges of election, at least ten days before any election is to be held."

" SEC. 46. At least thirty days previous to any general " election, and at least twenty days previous to any special " election, except in cases otherwise provided for, the " county clerk, in counties not under township organization, " shall make out and deliver to the sheriff of his county, " or in counties under township organization to the several " supervisors of his county, three notices thereof for each " precinct or district in which the election in such county, " is to be held."

" SEC. 59. All the ballots counted by the judges of election " shall, after being read, be strung upon a strong thread " or twine, in the order in which they have been read, and " shall then be carefully enveloped and sealed up by the " judges who shall direct the same to the officer to whom " by law they are required to return the poll-books, and " shall be delivered, together with the poll-books, to such " officer, who shall carefully preserve said ballots for six " months, and at the expiration of that time shall destroy " them by burning, without the package being previously " opened: *Provided*, if any contest of election shall be " pending at such time in which such ballots may be required as evidence, the same shall not be destroyed till " such contest is finally determined."

" SEC. 61. When the votes shall have been examined " and counted, the clerks shall set down in their poll-books "the name of every person voted for, written at full length, "the office for which such person received such votes, and "the number he did receive, the number being expressed "in words at full length; such entry to be made, as nearly "as circumstances will admit, in the following form," etc.

"SEC. 62. Such certificate, together with one of the "lists of voters and one of the tally papers, having been "carefully enveloped and sealed up, shall be put into the "hands of one of the judges or board of election, who "shall, within four days thereafter, deliver the same to the "county clerk or his deputy, at the office of said county "clerk, and when received, such clerk or deputy shall "proceed to open, canvass and publish the return from "each precinct or election district, as provided by law.

"SEC. 71. Within seven days after the close of the "election, the county clerks of the respective counties, "with the assistance of two justices of the peace of the "county, shall open the returns and make abstracts of the "votes in the following manner, as the case may require: "Of votes for governor and lieutenant governor, on one "sheet; of votes for other state officers, on another sheet; "of votes for presidential electors, on another sheet; of "votes for representatives to Congress, on another sheet; "of votes for judges of the Supreme court, on another "sheet; of votes for clerks of the Supreme court, on another "sheet; of votes for judges of the Circuit court, on "another sheet; of votes for senators and representatives "to the general assembly, on another sheet; of votes for "members of the state board of equalization, on another "sheet; of votes for county officers, on another sheet. "The foregoing abstracts shall be preserved by the county "clerk in his office.

"SEC. 72. The county clerk shall make out a certifi-

"cate of election to each of the persons having the highest number of votes for the several county offices, and deliver such certificate to the person entitled to it, on his application.

"SEC. 73. When two or more persons receive an equal and the highest number of votes for an office to be filled by the county alone, the county clerk shall issue a notice to such persons of such tie vote, and require them to appear at his office, on a day named in the notice, within ten days from the day of election, and determine by lot which of them is to be declared elected.

"SEC. 74. On the day appointed, the clerk and other canvassers, or, in case of their absence, the state's attorney or sheriff, shall attend, and the parties interested shall appear, and determine by lot which of them is to be declared elected; and the clerk shall issue his certificate of election to the person thus declared elected.

"SEC. 75. It shall be the duty of the county clerk on the receipt of the election returns of any general or special election, to make out his certificate, stating the compensation to which the judges and clerks of each election may be entitled for their services, and lay the same before the county board at its next session; and said board shall order the compensation aforesaid to be paid out of the county treasury.

"SEC. 76. Immediately after the completion of the abstracts of votes, the county clerk shall envelope and seal up a copy of the abstracts of votes for governor, lieutenant-governor, secretary of state, auditor of public accounts, treasurer, attorney-general, and superintendent of public instruction, and indorse upon it in substance, 'Abstracts of votes for state officers, from——county,' and address it 'The Speaker of the House of Representatives.' The "county clerk shall, at the same time, envelope and seal up, "a copy of each of the abstracts of votes for other officers, "and indorse the same, so as to show the contents of the "package, and direct the same to the secretary of state. "The several packages shall then be placed in one envelope, and addressed to the secretary of state."

What, then, are some of the principal duties of the county clerk in connection with elections?

He gives notice to the judges of election of their appointment; provides the necessary election blanks, poll-books and instructions, and delivers them to the judges of election; gives notice of general and special elections; returns of the election are to be delivered to him, and he is to open, canvass, and publish the same; with two justices of the peace he is to make abstracts of the votes, one of the votes for governor and lieutenant-governor; one for other state officers; one for representative in Congress; and one for county officers. He is to make out certificates of election to county officers; give notice to persons voted for of a tie-vote; issue certificates of election to persons elected by lot in case of a tie-vote; make out a certificate of compensation for judges and clerks; and send copies of abstracts of votes for governor, representative in Congress, and other officers, to the secretary of state.

When returned to and placed in his office, these papers and documents become a part of the papers, records and documents which, by law, he and his deputies are required and sworn safely and securely to keep. They are, in the eye of the law, as sacred as the records, papers and documents of any clerk's office, or other public office can possibly be. They contain the only legal evidence of the election of a representative in Congress; and no subject can be of greater importance to the public interests. A conspiracy to remove, and destroy such returns, ballots, tally-lists and poll-books, and to mutilate and alter the certificate of election, as charged, was a manifest and gross violation of section 5,512, and for which the parties charged are punishable in the courts of the United States.

To remove and destroy such tally-list, poll-book, certificate and ballots was to interfere with the county clerk and his deputies in the discharge of their duty to safely keep and preserve them, and in the further duty of opening and canvassing the returns and declaring the result of such election as required by law.

The second count does not charge the mutilation or alteration of the certificate of election attached to the poll-book as one of the objects of the conspiracy, nor is there in that count any charge of altering the certificate as one of the overt acts.

In the first and third counts, among other objects of the conspiracy, it is averred that the parties charged conspired to mutilate and alter the certificate of election of a representative in Congress, and among the overt acts charged in each of those counts is the changing of the result of the vote for state senator, so as to give to Leman the number of votes cast for Brand, and to Brand the number of votes cast for Leman. That such change was the mutilation and alteration of the certificate cannot be doubted. That it was an unlawful tampering with and a mutilation and alteration of the certificate, forbidden by the act of Congress, seems quite as certain. The certificate of election required by law, as appears by section 61 of the Illinois election statute, *supra*, is an entire paper, and is required to be made by the judges and clerks of election. In the same certificate such officers are required to embrace all the names of all the persons voted for, for the various offices to be filled at such election. These included, at the election referred to, electors for president and vice president, representative in Congress, governor, lieutenant-governor, secretary of state, state treasurer, attorney-general, state senator, representatives, clerk of Appellate court and county officers. If the willful falsifying and altering of the certificate in reference to any of these, except the representative in Congress, is no violation of the statute, then such act in reference to all except the representative in Congress would not be. If it were conceded that the certificate was mutilated and altered, and thus false and fraudulent in regard to all, except the representative in Congress, what validity or force could be given to it in regard to such representative? Surely, in such case, no one would attach to the certificate any force or validity whatever.

As a question of law the statute is violated when the alteration or mutilation extends to one of the persons voted for, and whose name is placed upon the certificate, as well as in case of two or more.

In the one case the moral, and perhaps legal turpitude is greater in degree, but the party in law does not any more surely commit a crime in the one case than in the other. In either case if the offender escapes, it is because the law of Congress does not reach the act. If in either case the law of Congress reaches the act, it as surely reaches it in both. By section 5514, Revised Statutes United States, punishment is imposed for attempting to vote illegally, when a representative in Congress is voted for, though upon the ballot attempted to be voted no person is attempted to be voted for for that office. And why? Because Congress has, by its legislation, endeavored to throw around such elections every guaranty and protection within its constitutional power. • The punishment is not imposed by the statute for mutilating and altering the certificate of the election of a state senator, but for mutilating and altering a certificate of the election of a representative in Congress. There being but one certificate, and the law requiring all the names of all the persons voted for for the various offices to be filled, to be placed upon that certificate, the mutilation and alteration of that certificate in any respect is a violation of the law of Congress, and brings the offender within the terms of the statute and the information. Section 5512, Revised Statutes, imposes penalties upon any person not entitled, who fraudulently registers or attempts to register, at any registration of voters for an election for a representative in Congress, or does any unlawful act to secure registration for himself or any other person. Such person may not intend to vote at all, or may intend to vote only for state officers, and not for a representative in Congress. That, however, makes no difference. It is an election at which a representative in Congress may be voted for. That section also provides, "If any such officer or other person who has any duty to "perform in reference to such registration or election," shall do or fail to do the things commanded or prohibited therein, they shall be punished as therein provided. The punishment is imposed in terms upon every such officer or person who "violates any duty imposed by law, or does "any act unauthorized by law relating to or affecting such "registration or election, or the result thereof, or any cer-"tificate, document or evidence in relation thereto." Section 61 of the election laws of the State of Illinois, *supra*, makes it the duty of the judges and clerks of election truly to make and return a certificate of the election, and to set down the name of every person voted for, written at full length, the office for which such person received such votes, and the number he did receive. That section is only complied with when the certificate contains the name of each person voted for, and the number of votes he did receive for the designated office. The certificate was an entirety. It was one paper. The law required but one, and to mutilate and alter it in reference to any of the names upon it was unlawful. It is charged in the information that the conspiracy, among other things, was entered into to mutilate and alter the certificate in reference to the vote cast for state senator, and that it was so mutilated and changed by the defendants. Such conspiracy and such act was a gross violation of law. The statute was as much violated as though the mutilation and alteration had been in reference to the votes cast for candidates for representative in Congress.

It is further charged in the first count that the conspiracy was entered into to make away with and destroy the tally list which, by section 62 of the election law, *supra*, was to be returned to the county clerk, and, as charged, was so returned. It is further charged, as one of the overt acts, that it was removed and destroyed. This paper was required by law to be preserved in the county clerk's office and as well as the certificate of election, was such a paper as is embraced in section 5512, Revised Statutes, and related to the election of a representative in Congress.

The second count charges the conspiracy to have been entered into to break open the package containing the election returns, and to remove therefrom a large number of the ballots cast for representative in Congress, and to destroy the same, and to substitute therefor false and spurious ballots: and also to remove from the county clerk's office and destroy the poll book and the certificate of election thereon. That in pursuance of such conspiracy the defendants executed the acts which the conspiracy is charged to have been entered into to accomplish.

The third count charges all the defendants with all the conspiracies charged in the first and second counts, and charges them all with uniting in overt acts in execution of such conspiracy, and that they did all the acts which the conspiracy was entered into to accomplish.

If such conspiracies and such acts as are charged in these counts are not violations of section 5512, it is difficult to conceive what would constitute such violations. If to conspire to remove from the county clerk's office and destroy the ballots, the poll-book, the certificate of election, and the tally list of such election, constituting as they do all the evidence of the election of a representative in Congress known to the law, and if the carrying out of such conspiracy, and the destruction of such ballots, the poll-book, the certificate of election, and the tally list do not constitute an offense under that section, then Congress has failed in its enactment to reach any result, and the section is meaningless and a mere collection of words. It reaches such a case as is here made, or it reaches nothing.

The state laws, imposing duties upon state officers in connection with the election of representatives in Congress, in so far as they come within the purview of the legislation of Congress, thereby become laws of the United States, and state officers and others are punish-

able under the statutes of the United States for their violation. In *ex parte Siebold*, 100 U S., 388, this court, in speaking of section 5512, and other sections of the election laws of the United States, said: "The state laws
" which Congress has no occasion to alter, but which it
" allows to stand, are in effect adopted by Congress. It
" simply demands their enforcement. Content to leave
" the laws as they are, it is not content with the means
" provided for their enforcement. It provides additional
" means for that purpose, and we think it entirely within
" its constitutional power to do so. It is simply the ex-
" ercise of the power to make additional regulations."

See also:

Ex parte Clark, 100 U. S., 399.
U. S. v. *Gale*, 109 U. S., 65.
Ex parte Yarbrough, 110 U. S., 651.

It appears by the record in this case that one of the two deputy county clerks was convicted with the plaintiffs in error.

2. The fourth and fifth counts of the information are based upon section 5511 of the Revised Statutes.

That section provides that if any person, at any congressional election, by unlawful means, compels or induces any officer of an election in any state or territory,
" to receive a vote from a person not legally qualified or
" entitled to vote; or interferes in any manner with any
" officer of such election in the discharge of his duties;
" or by any such means or other unlawful means, in-
" duces any officer of an election, or officer whose duty it
" is to ascertain, announce, or declare the result of any
" such election, or give or make any certificate, docu-

" ment or evidence in relation thereto, to violate or refuse " to comply with his duty, or any law regulating the " same; or knowingly receives the vote of any person " not entitled to vote, or refuses to receive the vote of any " person entitled to vote, or aids, counsels, procures or ad- " vises any such voter, person or officer to do any act " hereby made a crime, or omit to do any duty the omis- " sion of which is hereby made a crime, or attempt to do " so, he shall be punished by a fine of not more than five " hundred dollars, or by imprisonment not more than " three years, or by both, and shall pay the costs of the " prosecution."

The fourth count charges the defendants with conspiring to interfere with the county clerk and such two justices of the peace as he should associate with himself in the discharge of the duty of opening and canvassing the returns, by changing the certificate as in the first count, and by removing the tally-list.

The fifth count charges a conspiracy to remove and destroy the ballots, the poll-books and tally-list, and thereby interfere with the county clerk in the discharge of his duties.

It was the duty of the county clerk to associate with himself two justices of the peace and together they were to open and canvass the returns and declare the result.

Section 71, election laws, *supra*.

The law made it the duty of the county clerk to safely keep all the returns of the election. The conspiracy was to remove and destroy such returns and thereby prevent him from performing that duty. It is insisted by the plaintiffs in error that the county clerk is not an election officer within the meaning of section 5511, and that no person or officer can be an election officer, unless he has a duty to perform in connection with the election on the day and at the place where the election is held.

The laws of Congress imposing punishment for the violation of election laws are very general in their terms. They are made to apply to thirty-eight different states and to the varying laws, officers and machinery of those states. To reach and cover all the cases intended, only general words and terms could properly be used, and therefore Congress did not in any of the sections of the statute undertake to define who were election officers, but left it to the courts to determine that question as from time to time in the various states it should arise. The statute in terms imposes punishment upon every person who "interferes in any manner with any officer of such "election in the discharge of his duties." Why should the words "officer of such election" be limited to such officers as discharge their duties at the polls on the day of election? The county clerk has many and important duties to perform in connection with the election, and without him the election cannot be held, or its results declared. He is as absolutely indispensable as the judges of election themselves. He puts in motion the machinery for holding the election; he receives and canvasses the returns, and declares the result, and is the custodian of all the returns and ballots pertaining to the election; why, then, should he not be embraced in the term "officer of "such election," as much as any other person having a duty to perform in connection with the election?

Section 2012 of the Revised Statutes of the United States, provides for the appointment by the Circuit court, of supervisors of election at elections where a representative in Congress is to be voted for, and the revocation, change or renewal of such appointment from time to time as occasion may require. Sections 2016, 2017 and 2018 define the duties of such supervisors; and section 2025 provides that the court may appoint on a day named and thereafter, as vacancies may from any cause arise, from among the Circuit court commissioners, one of such officers who from the duties performed, shall be chief supervisor of elections, and shall discharge the duties of the position as long as he is faithful and capable. Section 2026 provides that the chief supervisor shall prepare and furnish for the use of the other supervisors, all necessary books, forms, blanks and instructions, and it is made his duty to receive, preserve and file all oaths of office of supervisors of election, and all special deputy marshals appointed for such elections, and all certificates, returns, reports and records of every kind and nature contemplated or made requisite under the law of his appointment. It certainly cannot be doubted that the supervisors, other than the chief supervisor, are officers of election under the law of their appointment; and it would seem to be equally clear that the chief supervisor is also an officer of election. It is true that the chief supervisor is to be appointed from among the commissioners of the court, but that fact, instead of being a disqualification for the appointment, is the necessary qualification for such appointment by the very terms of the act. Had the law made no provision for his appointment from among the commissioners of the court, he would, when appointed chief supervisor have been an officer of election; and his being, when appointed chief supervisor, a commissioner of the court, does not make him any the less an officer of election, and such an officer as is mentioned in section 5511 of the Revised Statutes. The county clerk is none the less an officer of election, because he is such clerk.

The county clerk by the very nature of his duties, is an officer of election, and for the same reason that the chief supervisor is such an officer. Their duties are very similar in many respects, and if the chief supervisor is by law an officer of election because of the duties he is required to discharge, then the county clerk should be so regarded, because the duties he is required to perform pertaining to elections are much more numerous and important than those discharged by the chief supervisor.

3. The sixth and seventh counts are based upon section 5403 of the Revised Statutes.

That section is as follows:

" Every person who wilfully destroys or attempts to " destroy, or, with intent to steal or destroy, takes and " carries away any record, paper or proceeding of a court " of justice, filed or deposited with any clerk or officer of " such court, or any paper, or document, or record, filed " or deposited in any public office, or with any judicial or " public officer, shall, without reference to the value of " the record, paper, document, or proceeding so taken, " pay a fine of not more than two thousand dollars, or " suffer imprisonment, at hard labor, not more than three " years, or both."

It is said that section does not embrace a public office like the office of the county clerk, for the reason that it was originally section 4 of "An Act to prevent frauds upon the " treasury of the United States," approved February 26, 1853 (Statutes at Large, Vol. 10, page 170); and that the act was only intended to apply to the treasury department and to frauds upon the treasury.

When embodied in that statute, section 4 had no reference to " frauds upon the treasury," and did not, by its terms, pretend to have any such reference. It referred:

First: to any court of justice, and to papers and records filed or deposited with any clerk or officer of such court.

Second: to "any paper or document, or record filed or "deposited in any public office, or with any judicial or "public officer."

There is not here the slightest reference to frauds upon the treasury, but the statute refers to any officer or clerk of any court of justice, and to "any public officer," or "to any public office," and the section does not in the remotest manner refer to the treasury or to anything connected with it, except in so far as it is referred to as a "public office," and that expression would apply to and cover any other public office as well as the treasury.

When this section was carried into the Revised Statutes as section 5403, and was re-enacted as a part of the Revised Statutes, it applied, as before, to all public offices which then existed, or might thereafter be created.

Take, for instance, the office of collector of internal revenue. That office was not created until 1862, and nine years after the passage of the act of which section 4 forms a part. Yet, who will doubt that the collector of internal revenue is a public officer, and his office a public office, within the scope and meaning of section 4, to any and every extent, as though created before that section became a law? That section was intended to embrace all public officers and public offices then in existence, or that might thereafter be created. Section 5 of the same act makes it a felony for any officer having the custody of any record, document, paper, or proceeding mentioned in section 4, to destroy the same. That section is reproduced as section 5408, Revised Statutes.

Further light may be thrown upon this subject by a reference to section 6 of the same act. By that section it is made a crime to bribe, or offer to bribe, any member of Congress, or any officer of the United States, or person holding any place of trust or profit or discharging any official function under or in connection with any department of the government of the United States or under the senate or house of representatives of the United States.

The same punishment is imposed upon the member, officer or person who shall in anywise accept or receive the same.

In the whole of that section there is not the slightest reference to frauds upon the treasury, or to the treasury department, except in so far as that department may be embraced in the words, "any department of the government of the United States."

It is also further to be noticed that section 5403 is the only provision of law enacted by Congress for the protection of the records and papers of a public office or of a court of justice. The inference seems irresistible that Congress intended that the words should be understood according to their plain and obvious import, and not in any restricted sense. That portion of the section referring to any court of justice and to the records and papers filed or deposited with any clerk or officer of such court can have and was intended to have no possible reference to the treasury or to frauds upon the treasury. The subject does not permit such a construction. The two subjects of courts of justice and clerks of such courts, and public offices and public officers, are very proper ones to be united in one section, the object being to protect the records and papers filed and deposited in both;

and the protection was intended to be equally broad and comprehensive in both cases. There is no limitation to the protection secured to the papers and records in the one case, any more than in the other.

Section 5403, as it now stands, ought then to be so construed as to embrace all public offices of the United States. It was re-enacted in 1873 in the Revised Statutes, and thereby became a part of that body of statutes, and finds its appropriate place therein. It was intended to embrace all the words fairly import.

It was in view of such a construction of the statute that the sixth and seventh counts of the information were framed; and it is now insisted that the county clerk's office, for the purpose of depositing and preserving the returns, poll-books, tally-lists and ballots in reference to the election of a representative in Congress, is a public office within the meaning of section 5403. The statutes of the state required them all to be returned to that office and there safely kept. Those laws became, by the legislation of Congress, laws of the United States, in so far as they affected the election of a representative in Congress, and are to be so treated and regarded as much as though directly enacted by Congress.

The law requires the supervisors of election appointed by the Circuit court to make returns of elections to the chief supervisor, and it is the duty of the chief supervisor to file and deposit such returns and preserve them in his office, with all papers and records pertaining to the election. The office of the chief supervisor is therefore created a public office, within the meaning of section 5403, and to steal or take from such office any of the returns or records of an election, with intent to destroy them, would be in violation of that section and would subject the offender to the punishment therein imposed. So, too, the law of Congress requires the returns of the election for representative in Congress to be returned to and safely kept by the county clerk in his office, and if section 5403 will protect the records of the election deposited in the office of the chief supervisor, it will, for the same reason, protect them in the office of the county clerk.

The law of Congress requires the returns to be made to and safely kept in the office of the chief supervisor. The law of Congress requires the returns of the same election to be made to and safely kept in the office of the county clerk. The returns in each case relate to the election of a representative in Congress, and the object of the law in requiring such returns to be made is to secure and preserve the evidence of the election. To this end the preservation of the returns made to the county clerk is far more important than the preservation of those made to the chief supervisor.

Congress has power to punish and has provided the means of punishing for a violation of duty any officer who has any duty to perform in reference to an election for representative in Congress, and under section 5512 the county clerk could be punished for any illegal acts defined in that section in reference to the poll-books, certificates, tally-lists or ballots, and this because the law of Congress requires them to be there returned and safely kept. How then can it be successfully contended that Congress has not made such office for the purpose of deposit and safe keeping of such papers and documents, a public office? Why for such purpose is not the county clerk's office a public office, within the meaning of the law, as much as a land office or a collector's office of the United States?

It was not the intention of Congress to provide punishment only for the officers having the custody of the returns and ballots in reference to the election of a reprentative in Congress, and leave all other persons free to steal, falsify or destroy them, and the legislation of Congress ought not to be so construed as to produce that result. Congress has not defined what shall constitute a public office, but has left it to the courts in the administration of the law to declare what shall constitute such an office. The words of the statute are broad and comprehensive, and they embrace any public office of the United States. They embrace and cover all papers and documents of a public nature which the laws of the United States have provided shall be deposited in a public place. They must, therefore, in this case apply to and cover the county clerk's office, as a place for the safe keeping and custody of the evidence of the election of a representative in Congress, placed therein as required by law.

ONE GOOD COUNT WILL SUSTAIN A GENERAL VERDICT OF GUILTY.

In this case a general verdict of guilty was rendered upon all the counts of the information.

If any one of the counts is good, it will sustain the verdict.

United States v. *Burroughs*, 3 McLean, 405, 411.
United States v. *Burns*, 5 McLean, 23,31.
Hiner v. *The People*, 34 Ill., 304.
Lyons v. *The People*, 68 Ill., 276.
Phelps v. *The People*, 72 N. Y., 372, 373.
Wharton's Crim. Pl. and Prac. Sec. 771 and notes.

United States v. *Plumer*, 3 Clifford, 68.
Bishop's Crim. Proced. (3rd ed.) Vol. 1, Sec. 1332.
Clifton v. *United States*, 4 How, 242, 250.
Snyder v. *United States*, 112 U. S. 216, 217.
Bond v. *Dustin*, 112 U. S. 609.

The counts of the information each charge that the conspiracy was entered into to effect more than one illegal object. To sustain either of the counts it would only be necessary to prove the conspiracy as to one illegal object charged, and therefore, if in this case any one of the objects of the conpiracy as charged is in violation of law, it will sustain the verdict.

Wharton, in his work on Criminal Law, Vol. 2, § 2346, says:

" Upon a count charging one conspiracy, and one only, " against all the defendants therein named, to effect several " illegal objects, the jury may find all or some of the de- " fendants guilty of conspiring to effect one or more of the " objects specified."

Mr. Russell, in his work on Crimes, Vol. 2, p. 704*, says:

" If upon an indictment for conspiracy, the jury find the " defendants guilty of so much of the indictment as " amounts to a misdemeanor, the court may pass judg- " ment upon the defendants. The defendants were in- " dicted for conspiring falsely to indict A. B. for keeping " a gaming house, for the purpose of extorting money " from the said A. B., and the jury found the defendants " guilty of conspiring to indict A. B. for the purpose of " extorting money, but not to indict him falsely; and it " was held that enough of the indictment was found to " enable the court to give judgment; for, in criminal "cases, it is sufficient for the prosecutor to prove so much "of the charge as constitutes an offense punishable by "law; and the jury had found the defendants guilty of "conspiring to prefer an indictment for the purpose of "extorting money, and that is a misdemeanor, whether "the charge were or were not false."

Greenleaf, in his work on Evidence, Vol. 3, § 96, says:

"But if the alleged intent be to accomplish several illegal objects, it will not be necessary to prove all the particulars of the charge; but it will be sufficient if a conspiracy to effect any one of the illegal objects mentioned "in the indictment be proved."

The prosecution by information was a legal and valid proceeding, warranted by the constitution and laws of the United States, and the several counts of the information charge offenses against the laws of the United States. The questions certified by the judges of the Circuit court ought to be answered accordingly.

John B. Hawley,
Richard S. Tuthill,
Of Counsel.